REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case N0: C 63/2014

In the matter between: **Applicant**

SOUTH AFRICAN REVENUE SERVICE

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

S MAFOYANE N.O. **Second Respondent**

NEHAWU obo MANGOJANE **Third Respondent**

Heard: **4 September 2014**

Delivered: **9 June 2015**

Summary: **An arbitration award which is not supported by the evidence before the commissioner is reviewable.**

JUDGMENT

LALLIE, J

Introduction

[1] This is an application to review and set aside an arbitration award of the second respondent ("the Commissioner") in which he found the dismissal of the individual third respondent ("the respondent") both substantively and procedurally unfair and substituted the dismissal with a final written warning valid for a period of six months, from 15 January 2014 to 14 July 2014. In terms of the reinstatement order, the applicant was directed to pay the respondent an amount of R 255 528.43. The application is opposed by the third respondent.

Factual background

[2] The respondent was employed by the applicant. He reported to Mr Tau ("Tau") who was the Port Commander at the Maseru border post. On 5 May 2012, the Customs and Border Control Unit ("CBCU") merged with the Customs Trade Operations at the Van Rooyen's border post. The Maseru and Van Rooyen's border posts are in the Free State region of the applicant. After the merger Tau became the senior manager in the Free State region and Mr Paul ("Paul") assumed the position of acting Port Commander at the Maseru border post. The respondent's reporting line changed as well as he had to report to Paul. The respondent made use of the applicant's motor vehicles in the performance of his duties. However, between May and July 2012 he failed to obtain the necessary authority for the use of the vehicles from Paul. His conduct continued unabated notwithstanding a verbal warning from Paul. Paul became aware that the respondent continued using the vehicles without his authority after the respondent was involved in a car accident. Investigations conducted subsequent to the accident brought to Paul's attention that the warning he had issued the respondent with had no effect on his conduct. The respondent was charged with 11 counts of unauthorised use of the applicant's motor vehicles, found guilty of the misconduct and dismissed. He challenged the fairness of his dismissal at the first respondent where the Commissioner issued the award which forms the subject matter of this application.

The arbitration award

[3] Giving reasons for his decision, the Commissioner found the testimony of Mr Klaai ("Klaai") suspect and applied the cautionary rule when evaluating it because he was, as the Commissioner put it, somewhat cagey and avoided answering questions which clearly sought to assist the applicant's case. Most of the time he stated that he could not remember and his testimony was also contradictory in some way and often showed bias in favour of the respondent. He recorded that it was Klaai's evidence that the respondent had to report to him only on operational issues but he still had to obtain approval from Paul. He could not understand how the respondent was expected to obtain authority before the commencement of a trip from Paul who was stationed at the Maseru border hundreds of kilometres away. He considered a concession made by Klaai that he gave verbal approval for the use of vehicles by his juniors and that one of them made a127 kilometres' trip without the necessary authority.

[4] The Commissioner had a dim view of the respondent's failure to tender evidence in the form of the trip authorisations approved by Paul for the use of the vehicles by the respondent. He recorded that Paul testified that the respondent reported to him but had to obtain the transport officer's approval for local trips. He took into account that the applicant relied on testimony of witnesses only and that the relationship between Klaai and the respondent was strained. He also found that the relationship between the respondent and Tau was to some extent strained. He considered trip forms which were submitted by the respondent to prove that authority was not obtained at the Van Rooyen's border post before the applicant's vehicles were used. He found that the applicant had failed to discharge the onus of proving that the respondent's dismissal was fair. He further found that the applicant acted inconsistently and that there was a strong probability that the respondent had the necessary authority to undertake official trips. He found that the applicant breached its own disciplinary code by not issuing the respondent with a final written warning for using its vehicles without authority. He concluded that the respondent's dismissal was both substantively and procedurally unfair,

substituted the sanction of dismissal with a final written warning valid for six months from 15 January 2014 to 15 July 2014 and directed the applicant to pay the respondent remuneration he would have earned from 14 March 2013 to 15 January 2014 in the amount of R 255 528.43.

Grounds for review

[5] The applicant's grounds for review are mainly that the Commissioner committed gross irregularities which led him to reach an unreasonable decision. Those irregularities include his incorrect application of the cautionary rule when assessing the evidence of Tau and Klaai when he had no reason to do so. He made mistakes of fact in finding that by issuing the sanction of dismissal, the applicant contravened its own disciplinary policy. He erred in finding that it breached its own disciplinary code by issuing the sanction of dismissal. He incorrectly found that Klaai had denied being a branch manager when he denied having given respondent authority to use the vehicles as he is not the appropriate person to grant such authority. He incorrectly drew the inference that the applicant acted inconsistently from documents for which no evidence was led. He was biased in favour of the respondent. A further gross irregularity the applicant sought to rely on was that the commissioner could not rely on its failure to submit evidence in the form of trip authorisations in finding that it had failed to discharge the onus of proof when it led *viva voce* evidence to prove the substantive fairness of the dismissal. Although the parties had confirmed that only the substantive fairness of the dismissal was challenged, the Commissioner went ahead and found the dismissal procedurally unfair too.

[6] The third respondent denied the existence of valid grounds to have the award reviewed and set aside. It submitted that Paul was aware that the respondent was using the applicant's vehicles. It further denied that Paul issued the respondent with a verbal warning for using the vehicles without authority and added that the respondent could have obtained the necessary authority from Mr Adonis ("Adonis") the transport officer. It was the respondent's case that use of the applicant's vehicles without authority was commonplace at the Free State region. It supported the Commissioner's conclusion that the applicant

applied the rule against unauthorised use of its vehicles inconsistently as the verbal authority that Klaai gave was in breach of the applicant's policy. It conceded that there was no need for the Commissioner to apply the cautionary rule. It however, submitted that he dealt correctly with the evidence of both Tau and Klaai.

Evaluation

[7] There is merit in the applicant's ground for review that the commissioner became overly involved in the arbitration proceedings illustrating a bias towards the respondent. The record does not support the third respondent's argument that the commissioner granted only the necessary assistance. It is instead awash with examples of the commissioner's bias. The commissioner went far beyond asking questions of clarity from witnesses, her cross-examined the applicants' witness vigorously in a manner which assisted the respondent's case. The respondent was not subjected to such cross-examination. His agenda from the manner and the extent of his intervention is almost palpable. He was paving the way to his pre-conceived decision that the respondent's dismissal was unfair. He therefore not only descended into the arena but assisted the respondent. He acted in breach of section 138(1) of the Labour Relations Act 66 of 1995 ("the LRA") which required him to determine the dispute before him fairly. The gravity of the failure to conduct the arbitration fairly is sufficient to render the arbitration award reviewable if the unfairness led the commissioner to reach an unreasonable decision. The record reveals that the commissioner's bias in favour of the respondent had the effect of rendering his award unreasonable.

[8] In determining the reasonableness of the award, the reviewing court has to consider the evidence before the Commissioner in its totality and determine whether he or she considered the principal issue, evaluated the evidence and reached a reasonable decision. In this regard see *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[1]. The court in *Herholdt v Nedbank Ltd*[2] made it clear that not every error committed by a Commissioner

[1] [2014] 1 BLLR 20 (LAC).
[2] [2013] 11 BLLR 1074 (SCA) para 25.

necessarily leads to the reviewing and setting aside of an award. It is only when they have an effect of rendering the outcome unreasonable that this court may interfere with the award. The Court further held that the "*Sidumo* test" will justify the setting aside of an award on review if the decision is "entirely disconnected with the evidence" or is "unsupported by any evidence" and involves "speculation by the commissioner".

[9] The Commissioner found that the applicant showed that the respondent's trip from Dewetsdorp to Van Rooyen's border post could not have been an official one. He expressed the view that the applicant's disciplinary code provided for a final written warning before a dismissal. He made a finding that the applicant did not show good cause for skipping the final written warning and issuing a dismissal. He concluded that the respondent should have received a final written warning for the Dewetsdorp trip. Amongst the mistakes of fact made by the Commissioner which the applicant sought to rely on is his finding that the applicant misdirected itself in applying the sanction of dismissal in contravention of its own policy. It submitted that the policy provides that the appropriate sanction for a first offence relating to misuse of company property is a final written warning. He gave no valid reason for disregarding Paul's evidence that he gave the respondent a verbal warning for misuse of the applicant's vehicles. The result of the Commissioner's failure to take that evidence into account is that it led him to reach the decision that the respondent was a first offender and should therefore have been issued with a final written warning. The incorrect finding therefore resulted in the Commissioner concluding that the dismissal was procedurally unfair. The issuing of the verbal warning is not denied by the third respondent in its answering affidavit. The applicant's disciplinary code in deed provides that the sanction for misuse of company property is a final written warning followed by dismissal. The Commissioner acted unreasonably in not taking into account that consistently with the disciplinary code the respondent was given a warning when he first committed the misconduct and only dismissed when he repeated it. His finding that the dismissal was procedurally unfair flies in the face of the third respondent's intimation that procedural fairness was not challenged.

[10] Implicit in the finding that the trip to Dewetsdorp was not official is a concession by the Commissioner that the respondent committed the misconduct of misuse of the applicant's motor vehicle. His conclusion that the applicant failed to discharge the onus of proof and that the respondent's dismissal was substantively unfair is in conflict with his own findings which are supported by evidence before him. So is his decision that the sanction of dismissal was inappropriate. The evidence before the Commissioner was that the respondent committed misconduct for which dismissal is the appropriate sanction to employees who were not committing it for the first time in terms of the applicant's disciplinary code. His decision that the sanction of dismissal was inappropriate has no basis. The error constituted a gross irregularity which rendered his decision unreasonable.

[11] The Commissioner found that the applicant applied discipline inconsistently by not taking disciplinary measures against Klaai's subordinates who were given verbal instead of the written authority required in the disciplinary code for using vehicles. The purpose of the principle of consistence is to ensure that employees who have committed similar misconduct are not treated differently. It is a principle of fairness which should not be applied rigidly. In this regard see *SACCAWU and Others v Irvin & Johnson Ltd*[3]. The Commissioner accepted that Klaai's subordinates used the vehicles with authority although it was granted verbally and not in writing as required in the disciplinary code. They acted in a manner which is materially different from the one which led to the respondent's dismissal as his manager had warned him against using vehicles without his authority. In addition, he was not even aware that the use of the vehicles without his authority was continuing. It can therefore not be said that Klaai's subordinates committed misconduct similar to that committed by respondent. The Commissioner therefore committed a gross irregularity in finding that the applicant had acted inconsistently in taking disciplinary action against the respondent and dismissing him. The gross irregularity influenced his decision and rendered it unreasonable. The commissioner dealt with the principal issue before him. He failed to evaluate evidence and reached an

[3] (1999) 20 *ILJ* 2302 (LAC).

unreasonable decision. His decision therefore falls outside the bounds of reasonableness.

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

12.1 The arbitration award issued by the second respondent under case number FS 2174/13 and dated 16 December 2013 is reviewed and set aside.

12.2 The matter is remitted to the first respondent to be arbitrated *de novo* by an arbitrator other than that the second respondent.

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Lallie, J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr Ellis of Edward Nathan Sonnenbergs Inc.

For the Third Respondent: Mr Pholeo of NEHAWU