



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

CASE NO: PR 276/14

In the matter between

INDEPENDENT CONCRETE MTHATHA CC

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

NOZIGQWABA M N.O

Second Respondent

NUM obo LIMEKHAYA, V.E

Third Respondent

Heard: 10 November 2016

Delivered: 24 November 2017

Summary: When the applicant has not established valid grounds for the Labour Court to interfere with the value judgment of a commissioner of the CCMA, the arbitration award of that commissioner falls within bounds of reasonableness and not reviewable.

JUDGMENT

Lallie, J

Introduction

- [1] In this application the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent who will be referred to as the commissioner in this judgment. It is opposed by the third respondent.

Factual background

- [2] The applicant supplies ready mixed concrete to the building and civil construction industry. In March 2014, it had a contract with DGI Construction (DGI) which was building a shopping mall in Mthatha (the mall). It employed the third respondent as a truck driver whose duties included delivering the applicant's product. In terms of the contract, the applicant had to deliver ready mixed concrete at the mall building site. DGI dug holes of about 3x3 metres in size and half a metre deep in the construction of the mall. On 24 March 2014, the third respondent drove into one of the holes while delivering ready mixed concrete at the mall. He was issued with a final written warning for reckless and negligent driving thereby causing damage to the applicant's property. On 25 March 2014, the third respondent reversed into another hole. He was subjected to a disciplinary enquiry the chairperson of which took a decision to dismiss him. He referred an unfair dismissal dispute to the CCMA where the commissioner found his dismissal unfair and ordered the applicant to reinstate him. In this application the applicant seeks an order reviewing and setting aside the commissioner's arbitration award.

The award

- [3] The commissioner found the third respondent's dismissal unfair, mainly because the applicant was partly responsible for the truck reversing into the hole. He found that the third respondent's evidence that the holes were supposed to be marked, had no reflectors or safety nets was not disputed. He further found that the applicant did not properly quantify the expenses incurred as a result of the incident. An additional reason was that the applicant's disciplinary code did not prescribe the sanction of dismissal when

the offence was committed for the second time while a final written warning was still valid. As he had found the dismissal substantively unfair and harsh, he ordered the applicant to reinstate the third respondent.

Grounds for review

- [4] The applicant submitted that the commissioner committed gross irregularities and/or exceeded his powers as an arbitrator and failed to act as a reasonable decision-maker in that he failed to appreciate the law applicable to pre-existing and current final written warnings. The third respondent denied that the commissioner misunderstood the law in this regard because an employee's dismissal is not automatically justified on commission of similar misconduct pursuant to the issuing of a final written warning. The applicant further submitted that the finding that the applicant was partly to blame for the third respondent's misconduct was not based on the evidence before him. Opposing this ground for review, the third respondent submitted that it was his evidence at arbitration that the applicant contributed to the accident by not taking the necessary measures to warn him of the area where the hole was. The applicant submitted that the commissioner erred in finding that the applicant's failure to call a witness to prove the expenses incurred by the applicant as a result of the accident justified a sanction less than dismissal. The third respondent submitted that the finding is justified and based on evidence of the truck's maintenance report which reflected that most of the repairs made were not related to fixing the clutch of the truck the third respondent was alleged to have damaged.

Test for review

- [5] The applicant submitted that the award is defective as envisaged in section 145 (2) of the Labour Relations Act¹ and that the commissioner committed errors in the conduct of the arbitration proceedings which resulted in him reaching an unreasonable decision. In argument, the applicant relied on

¹ 66 of 1995 (the LRA)

authority which is based on the following *dictum* in *Head of the Department of Education v Mofokeng and others*²

“Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result”.

- [6] In determining whether the applicant established grounds for review, this court is enjoined to consider the evidence which served before the commissioner in its totality. The applicant submitted that the commissioner erred in finding that it was partly responsible for the incident of 25 March 2014 and basing on that finding his decision that the sanction of dismissal was inappropriate. The applicant argued that it was never the evidence of the third respondent or anyone else that the holes were supposed to be marked. The third respondent submitted that it was his evidence at arbitration that he did not see the holes because it was dark, the holes were unmarked and the reverse lights of the truck were not working. A reading of the record supports the third respondent's version that he testified at the arbitration that all the holes had no reflectors, no danger nets and no danger plates. His evidence was not challenged and the applicant did not raise the issue that those safety measures should not have been provided. The commissioner can therefore not be faulted for relying on the third respondent's unchallenged evidence
- [7] The applicant's argument that the foundation of the finding that it contributed to the incident of 25 March 2014 has no merit as it is not supported by evidence is unsustainable. Mr Alberts (Alberts) who testified on behalf of the applicant did not refute the third respondent's evidence that he reported the condition of the reverse lights to the applicant's mechanic.
- [8] The applicant further submitted that the commissioner erred in not taking into account that the legal position in respect of final written warnings is that they

² [2015] 1 BLLR 50 (LAC) para 33:

constitute a warning that any future transgression could lead to dismissal. The third respondent argued that the applicant's reliance on the final written warning was misplaced as the third respondent was charged and dismissed for reversing into holes on two occasions. The third respondent was dismissed for reckless and negligent driving which resulted in damage to the applicant's truck. The commissioner accepted the applicant's version that the third respondent was on final written warning for similar misconduct. In reaching his decision on sanction, the commissioner found that the applicant's disciplinary code does not prescribe dismissal if the offence is committed for the second time while a final written warning subsisted. This finding is consistent with Alberts' evidence that the applicant's disciplinary code provides that an employee found guilty of negligent or reckless driving should first be given a sanction of a final written warning. If the employee commits the same offence for the second time while the warning is still valid, the employee should be subjected to a disciplinary hearing which may result in the imposition of a sanction of dismissal. When the third respondent repeated the misconduct on 25 March, dismissal was not an automatic sanction but one of the sanctions that could be issued in terms of the disciplinary code.

- [9] Contrary to the applicant's submissions, the commissioner did not error in finding the third respondent's dismissal for the incident of 25 March 2014 inappropriate. The commissioner used his value judgment in reaching his decision on the fairness of the third respondent's dismissal. He based his decision on the evidence before him that the third respondent was charged and dismissed for similar misconduct he committed on two occasions although he had been issued with a final written warning on 24 March 2014 for one of those occasions. His finding that the applicant contributed to the incident of 25 March 2014 cannot be faulted. The applicant did not establish valid grounds for this Court to interfere with the manner in which the commissioner exercised his value judgment. The award falls within bounds of reasonableness.

[10] I am not convinced that the applicant acted unreasonably in bringing this application. In the circumstances a costs order against the applicant will not be appropriate.

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

Order:

1. The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Kirchmann of Kirchmanns Attorneys

For the Third Respondent: Advocate Grogan

Instructed by Wesley Pretorius & Association

LABOUR COURT