



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1387/09

In the matter between:

**JDG TRADING (PTY) LTD t/a
ELECTRIC EXPRESS**

Applicant

And

**OSLER, A N.O (CITED IN HIS
CAPACITY AS PRIVATE
ARBITRATOR)**

First Respondent

SACCAWU OBO N JUGAR

Second Respondent

Heard: 30 January 2013

Delivered: 20 March 2013

JUDGMENT

BHOOLA J

Introduction

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act, 66 of 1995 (“the Act”) to review and set aside the ruling issued by the second respondent (“the arbitrator”) in his capacity as a private arbitrator. Mr Sebotsa appeared to oppose the matter on behalf of the third respondent, although he had not filed an answering affidavit nor had he prepared heads of argument. He did not seek a postponement and the matter proceeded on an unopposed basis.

Background facts

[2] Ms Nomsa Jugar, referred to hereinafter as the employee, was employed by the applicant as Branch Manager at its store in Botshabelo, Free State. She was charged at a disciplinary enquiry held on 31 July 2008 with four counts of misconduct, and was dismissed on 15 August 2008 following a finding of guilty on all four charges. The dispute was referred to private arbitration and her dismissal was found to have been substantively unfair. Procedural fairness was not in issue and the arbitrator was required to determine only substantive fairness with regard to the guilt of the employee and the fairness of the sanction.

Grounds of review

[3] The applicant submits that the arbitrator misconstrued the evidence on the first charge in its entirety. He simply ignored material evidence and failed to properly determine the probabilities. In this regard it is apparent from the award that the arbitrator went out of his way to try and establish some or other basis for acceptance of the evidence led by the employee, when there was simply no justification to do so. His own findings in fact were that the employee’s version “had a number of problems”, that her version was not put to the applicant’s witnesses, and that material aspects of the applicant’s case was not disputed. In this context the arbitrator should have accepted the applicant’s version as uncontested. Despite this however, he simply concluded that he was “satisfied with her testimony” and her “demeanour”. The applicant submits that this is not the conduct of a reasonable decision maker on the applicable review test established in

Sidumo & Another v Rustenberg Platinum Mines Ltd & others,¹ as it reflects a gross irregularity in the proceedings which resulted in the applicant being denied a fair trial.

Analysis

- [4] The legal principles applicable to a review in terms of section 33(1) of the Arbitration Act were dealt with extensively in *Stocks Civil Engineering (Pty) Ltd v Rip NO & another* (2002) 23 ILJ 358 (LAC).
- [5] In assessing the award in the context of the grounds of review it is significant to note that the charge was one of fraud, and the arbitrator found that the employee had not acted dishonestly and had not committed fraud. The applicant submitted however that once a finding is made that a version was not put to the applicant's witnesses, such a version must on the applicable legal principles be rejected. By relying on such a version in circumstances where the applicant did not get a chance to respond, the applicant was denied a fair hearing. The arbitrator was therefore duty bound to have rejected the employee's version and his failure to do so constitutes a gross irregularity and renders the award reviewable.
- [6] The applicant further submitted that the onus was on the employee to call witnesses in rebuttal of the *prima facie* case against her in respect of charge one. Instead, he simply accepts the say-so that none of them was available. The arbitrator should have drawn a negative inference from the failure to call any witnesses in support of her version (particularly to the effect that that the customer and Motswere resided in the same household, which is crucial to her defence, as well as whether she had received the necessary training on the National Credit Act and the regulations). Furthermore, the reliance on the employee's credibility, in circumstances where the probabilities clearly favour the applicant, was manifestly irregular. In this regard the applicant submitted that this court has reviewed an award in similar circumstances, in *Network Field Marketing (Pty) Ltd v Mngenzana NO & others* (2011) 32 ILJ 1705 (LC) at [16] and [17].

¹ [2007] 12 BLLR 1097 (CC).

- [7] Furthermore, it was submitted that the employee's explanation that no identity document was used in the transaction clearly fell to be rejected on the probabilities. The evidence was that Motswere's identity document was used and Motswere testified that her identity document was lost and she did not know either the employee or Kilimanjaro and in fact did not even own a television. This is material evidence which was never contradicted in cross examination and in fact, had it been considered by the arbitrator, would have resulted in the employee's version on this issue being rejected. The arbitrator also failed to have regard to the evidence of Salemane to the effect that she informed the employee that the customer could not purchase the television without an identity document, and that although the employee then took over the transaction, Salemane's employee number was used to process the sale. This in itself implies dishonesty on the part of the employee. The employee was branch manager and a greater standard of care is required in such an instance. Moreover, the existence of the standing rule that a television set may not be sold to someone who does not possess a licence was not disputed and as the head of the branch it was incumbent on the employee to establish what the rule was and to ensure that the conduct was in compliance. Given the arbitrator's conclusions it is clear that he failed to apply his mind to the material facts and circumstances, thus rendering the award reviewable on the grounds of both unreasonableness and a latent procedural irregularity.
- [8] The applicant submitted therefore that the conduct of the arbitrator constitutes a gross irregularity and that this justifies the review.
- [9] Insofar as the applicant relies on the commissioner ignoring material evidence such as that led by Motswere in relation to her identity document, it is clear from the record that much of this evidence was immaterial. The gist of her testimony was that her identity document was misplaced after it had been used by her mentally disabled son, and that when she went to home affairs she discovered that her identity document had been used to purchase a television at Electric Express. The obvious inference the commissioner was required to draw from this evidence was the Kilimanjaro was dishonest in presenting her identity document as a co-

resident of his household. The commissioner in my view correctly treated this evidence as suspect in that it is not relevant to the alleged fraud with which the employee was charged. There was no evidence that she acted in concert with Kilimanjaro nor was she charged with failing to investigate the circumstances relating to his possession of the identity document. Motswere was moreover never called to give evidence at the disciplinary enquiry and was unable to explain why this was the case. It was moreover not disputed that she had been taken to a police station to sign her evidence by the applicant's representative but she was illiterate. The evidence of the sales person was that when the employee was told that Kilimanjaro wanted to purchase a television but did not have an identity document her attitude was that no customer should be allowed to leave the store without receiving assistance whether they were in possession of an identity document or not. The sales person's evidence was not of much value in that she denied having signed her statement made to the disciplinary enquiry. Kilimanjaro was not called to testify by the applicant and the applicant's version in relation to the alleged fraudulent conduct of the employee was not proven. The commissioner in this regard was correct in circumventing evidence in regard to whether there was a standing directive to the effect that foreigners could purchase televisions by producing their passport or travel permits. He correctly identified the issue as being whether the employee had fraudulently used an identity number to approve the purchase and on the evidence presented cannot be faulted for determining that there was no evidence led by the applicant to prove this charge.

[10] The arbitrator set out the charges against the employee, as follows :

- “1. It is alleged that on 15 March 2008 the applicant fraudulently used a customer's ID number to invoice a tectronic 74cm TV for Mr M Kilimanjaro on account number 18553-4”.
2. It is alleged that the applicant made customers sign incomplete and blank agreements in ten instances (details not necessary here) in a total estimated credit advance of R37974.01, in breach of the National Credit Act.
3. It is alleged that the applicant failed to conduct an affordability exercise on account 18910-02 in breach of the National Credit Act requirements.

4. It is alleged that the applicant failed to give duplicate copies of the credit agreement to seven customers (details not necessary here) in breach of the National Credit Act”.

[11] The arbitrator found the employee not guilty on the first count and guilty of the second, third and fourth counts of misconduct.

[12] The arbitrator recorded the evidence of James Mkhumla, the Regional Finance Manager of the applicant, to the effect that in terms of the applicable regulations since 1994 any person purchasing a television set was required to show that he had a television licence. He said that a store or business unit that sold a television without a television licence could be held liable for a fine in terms of the regulations. Furthermore, the applicant’s policy (the standing instructions) made it compulsory for employees to comply with the applicable legislation and stated that any falsification or attempts to change any company documents was serious misconduct and constituted a dismissible offence. His further evidence, as recorded by the arbitrator, was that it was clear from his investigations that the identity number used for Mashiri Kilimanjaro’s television purchase was not his own nor was there any link between him and the person (Poppie Alina Motswere) whose identity number had eventually been used to approve the transaction. He discovered that the Credit Manager, Alina Nqai, refused to process the transaction but it went through after it had been transferred to the employee. He was informed that Kilimanjaro was not a South African citizen, but in his view this made no difference in his case since the rule that permitted temporary foreigners to purchase television sets provided they were in possession of a passport did not apply at the Botshabelo store. At Botshabelo no customer was allowed to buy a television set without a licence and the employee did not show him any document indicating that Kilimanjaro had produced his passport or any other permit. He testified further that the employee knew she could not use another customer’s identity number for the purchase and she did not deny using Motswere’s identity number for Kilimanjaro’s purchase. Instead, her explanation was that she was only helping a customer as she was obliged to do.

[13] Mkhumla's evidence was further that the employee had received the necessary training in the National Credit Act and the FAIS Act, and had facilitated training on the FAIS Act for her staff. She had never expressed any dissatisfaction about the comprehensiveness of the training she received until the disciplinary enquiry.

[14] The arbitrator recorded the employee's version as follows :

"The applicant said that she had only received FAIS training. She said her training of store staff consisted of reading of modules from the computer each morning, according to the standard practice in the respondent business. Her 'NCA Compliance' competency form was signed after Mr Mkhumla had phoned her and asked her to sign it but she did not want to do so, she phoned a colleague by the name of 'Celeste' and told her that she had not done any NCA training and didn't want to sign the form and Celeste told her she need not sign so she did not sign. Later Celeste told Mkhumla what she (the applicant) had said and Mkhumla phoned the applicant and forced her to sign it and send it to him – he was rude and even told her she was talking nonsense when she claimed not to have attended any training".

[15] In reaching his conclusions the arbitrator further had regard to the fact that the employee had previously worked at a store in Lesotho where there were no similar requirements for television licences and she had only been employed at the applicant for a few months prior to the issue arising. With regard to the first charge the employee testified that Pauline Salemane was the sales person who attended to the customer and completed the pro forma order form. Because the customer was buying on cash the credit manager refused to assist her with finalising the sale and she complained to the employee. The employee asked what the problem was since licence requirements were new to her, and Salemane informed her there was no need for a licence if the customer lived in a household where a licensed television existed. She then asked Salemane what the procedure was with foreigners and the latter replied that they "often bought on someone else's name but this customer wanted to buy in his own name". The employee wanted to make the sale because times were difficult and was aware that other stores had no similar restrictions on foreigners making purchases. She made enquiries from a manager at

another store in the JD Group, a Russells store in Ladybrand, which was near the Lesotho border, and was informed that the store did sell to foreigners. On this basis she tried to print the delivery note but the computer system would not allow her to sign out the television. She then contacted the applicant's acting Regional Manager for the Natal region, Roy van Tonder, and he tried to help her through the process on the system but the computer would still not print the invoice. After a number of attempts to obtain assistance from another staff member as well as the help desk she again contacted Van Tonder and in the end was advised that the correct procedure was the one referred to by Salemane, i.e. to use the licence of a person in the customer's household. She approached the store clerk, Eugene, and informed him to contact the customer and ask him to bring in a licence of one of the members of his household. He brought it in the following day and left it with Eugene and when the employee arrived she was able to process the delivery note in the system to confirm the sale. She testified that she was not given an identity document but only the television licence card, and she made enquiries to confirm that it was a valid licence. The customer was therefore not charged the R225.00 licence fee.

- [16] In cross examination she confirmed that she did not make enquiries higher up the management hierarchy and thought that there was no need to approach anyone higher than the acting Regional Manager. It had not been put to her at the disciplinary enquiry that she must have known that the person whose name the licence was issued in and the customer were two different people, one was male the other female and their identity numbers differed, and she explained that she had been told that the standing instruction authorised a transaction in circumstances where they lived in the same household. She disagreed with the proposition that she must have known at the time that the licence of one person could not be used for another person's transaction and explained that she had joined the applicant a few months prior to this incident and had not by then managed to learn everything about the applicant's systems. Her explanation was as follows :

“I don’t agree ... because I didn’t know the procedure and what has been happening with the branches (sic) the JD branches across the border I believed I genuinely believed that it was the same as the JD company especially in those branches where we are working, uh managers fight for sales, managers and sales people fight for sales while the credit manager declines the sales without good reason and the fact that the sales person herself came to me complaining about the credit manager not showing her willingness to help the customer, what was I supposed to do.”

[17] In any event the employee denied that her conduct was fraudulent in that she knew the licence did not belong to the customer. This was her version in her disciplinary enquiry as well and she testified that the system accepted the transaction on this basis and she had been satisfied by her enquiries as to the procedure to be followed as per the standing instruction. The finding therefore of the arbitrator, based on this evidence, that the employee had innocently used the television licence of another person in the belief that it was permissible if the customer and the licence holder were part of the same household, cannot be faulted as being unreasonable or based on a gross irregularity in the proceedings. There was simply no evidence of fraud for the employee to rebut, as was submitted by the applicant.

[18] The applicant submitted that the arbitrator found that a number of problems existed with the manner in which the employee’s evidence was led (i.e. crucial aspects of her version were not put the applicant’s witnesses for comment, nor were these aspects disputed) but despite this he found that her version was consistent with the one she presented in her disciplinary enquiry. He also found that the employee’s failure to call witnesses had been explained both informally and also in written argument by the employee’s representative as being due to their unavailability, and did not find it strange that there was no colleague led in evidence nor document presented to support the employee’s case that the practice was to permit multiple occupants of a household to purchase televisions on the basis of a single licence. The arbitrator further noted that when the employee had been unable to obtain advice from senior colleagues, she

did not make any attempt to contact the applicant's head office, but failed to have regard to this in assessing her guilt.

- [19] I am not satisfied that these are valid grounds for review. On an overall assessment of the evidence, and based on both the probabilities and the credibility of witnesses, it cannot be said that the arbitrator committed a gross irregularity in the proceedings or made an unreasonable award.

The arbitrator found that although there were difficulties with the probabilities “[h]owever that may be, I am satisfied with the demeanour of the applicant as a witness and the content of her testimony in respect of this charge. Although there are problems with her version, it is credible, it was raised previously which deals with the accusation of recent fabrication, her senior colleagues did not inform her otherwise and the computer system allowed the transaction to go through. And this is against the background of an employee who transferred from Lesotho some months previously and who underwent what appears to be a crash course in South African procedures during a busy time of year. All this adds up to the probability that, although the applicant may have been negligent in a number of respects, the core of dishonesty underlying the charge has not been proved on a balance of probabilities”.

- [20] The applicant relied on the additional ground of review based on the arbitrator's lack of reasoning as to the appropriateness of a sanction of dismissal in circumstances where the employee was found guilty at the arbitration of three charges of misconduct. In regard to this ground I similarly cannot find that the award is reviewable. The arbitrator properly applied his mind to the relevant factors in *Sidumo & Another v Rustenberg Platinum Mines Ltd & others*², as is apparent from his reasoning. He finds that although the employee was clearly guilty of a breach of legal compliance and of negligence and that there were honesty issues in respect of her responses to certain questions and her case related to training was based on blaming others, certain mitigating factors existed. These were that she “had been employed relatively briefly before the incidents in question, that she had come from another country where different rules applied in at least the first count, there is no prior disciplinary record, the respondent suffered no actual prejudice or loss,

² [2007] 12 BLLR 1097 (CC).

and that there may have been some gaps in her training. And, while she may have contravened the legal requirements in various respects and potentially prejudiced her employer, her fault was that of over-enthusiasm rather than dishonesty.” Having regard to all these factors the arbitrator concluded that the sanction of dismissal was not fair or appropriate in the circumstances. The arbitrator further mitigated the loss to the applicant in fashioning a remedy that took into account the employee’s laxness, which could have caused prejudice to her employer in ordering that she be reinstated but not paid any arrear wages up to May 2009. I cannot find fault with his conclusion or reasoning on the *Sidumo* test or otherwise. This is a well-reasoned award that weighs the probabilities and credibility issues in a balanced, justifiable and reasonable manner and the submission that the applicant was denied a fair trial as a result of gross irregularities or that the decision was not one that could be made by a reasonable decision maker cannot be sustained.

Order

[21] In the premises, I make the following order :

The application is dismissed. There is no order for costs.

BHOOLA J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT

A J POSTHUMA, SNYMAN ATTORNEYS

THIRD RESPONDENT:

P SEBOTSA, SACCAWU

Labour Court