Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 715/13

In the matter between:

PICK 'N PAY HYPERMARKET **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION **First Respondent**

MR JOSEPH MPAHPULU *N.O.* **Second Respondent**

SACCAWU OBO MR THAMI MNISI **Third Respondent**

Heard: 22 October 2015

Delivered: 12 November 2015

Summary: (Review – arbitrator misconstruing correct approach to evaluating evidence and test of proof on balance of probabilities – grossly irregular and irrational – evidence not admissible as hearsay, admissible and relevant for other purposes)

JUDGMENT

LAGRANGE J

Background

[1] In this matter, the third respondent was dismissed after being found guilty of removing a laptop from the kosher bakery of the respondent, with the intention of removing the item from the applicant's store group without authority, or in other words attempted theft.

[2] The basis on which he was found guilty was that he admitted having taken it to three security guards who had been called in to investigate the missing laptop shortly after it had gone missing. According to their evidence they had identified him as a possible suspect because he appeared to be ill at ease and restless compared to the other personnel in the bakery. They questioned him and he had admitted to hiding the laptop in one of the fridges. After obtaining the admission the security guards were on their way back to speak to the head of the department, known as 'Raol'. When they met him he told them that they had found the laptop in one of the fridges in the course of conducting a search of the premises.

[3] Two of the security guards testified at the arbitration and the arbitrator found that their evidence corroborated each other, which gave their version weight without necessarily meaning that their versions were truthful or reliable. The arbitrator was unconvinced by their evidence because they did not reduce the admission made by the third respondent to writing and did not even recorded in the occurrence book. Neither of these last two issues had been raised by the third respondent or his representative in the course of the enquiry but were issues canvassed by the arbitrator on his own initiative. He also found that it did not make sense why the third respondent would hide the laptop in the refrigerator, to which other employees in the bakery had access. The arbitrator was also unconvinced by evidence of one of the security guards that when he went to see if there was any video footage of the area where the laptop disappeared, he found that there was no camera covering the bakery area where the laptop went missing. He found it suspicious too that there was a two-week gap between the date when the laptop was stolen and the employee being told he was suspected of the misconduct. In his view, the

delay could not be justified because no further investigations were necessary.

[4] The third respondent's defence was brief. At some stage during the morning in question, five or six security officers entered the department. While they were still there, "… there came Raol carrying a laptop". According to him the security officers never questioned him nor did he indicate that there was any interaction of any sort between himself and them. Two weeks later he was told that he was suspected of taking the laptop.

The review

[5] The applicant seeks to review and set aside the award on the basis that it is one that no reasonable arbitrator could reach. In particular, the applicant highlights the following in support of this ground:

5.1 the arbitrator's effective conclusion that the evidence of the security guards could not be regarded as truthful or reliable, cannot be justified;

5.2 the arbitrator unjustifiably excepted a version of the third respondent which amounted to a bare denial despite the corroborative evidence of the two company's witnesses.

[6] Another ground of review is that the arbitrator embarked on the wrong enquiry which amounted to a gross irregularity. In essence, the applicant contends that the arbitrator approached the enquiry on the basis that in order to find the third respondent guilty he had to be satisfied that this was the possible interpretation of the evidence.

[7] In defending the arbitrator's award, the union emphasised the issues which had caused concern to the arbitrator, such as the lack of video surveillance footage, the delay in charging the third respondent, the failure to record a written confession and the failure to lead the evidence of Raol, who found the laptop.

[8] It suffices for the purpose of this judgment to cite ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*** in which the SCA set out the principles governing review based on gross irregularity:

> *'…For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequences if their effect is to render the outcome unreasonable.'*[1]

(emphasis added)

Rationality

[9] The arbitrator's statement that the evidence of the two security officers was both consistent and corroborative of each other and accordingly gave weight to their version, but nonetheless that did not make their version truthful or reliable is an extraordinary one. The fact that their evidence corroborated one another's and did so consistently is a consideration that has a direct bearing on the truth value to be attached to their evidence. The reliability of their testimony is likewise enhanced by the fact that their evidence was mutually consistent. It is absurd to suggest that evidence which consistently corroborates other evidence has no bearing on the truth or reliability of that evidence.

[10] The arbitrator also manifestly failed to weigh up the probabilities of the applicant's version against the probabilities of the third respondent's version. In essence the third respondent's version was that the security officers merely appeared in the bakery, made no enquiries and then Raol just appeared with the laptop. His version also entails accepting that despite there being no interaction of any kind between him and the security officers, he was accused of removing and concealing the laptop in a fridge, based on a fabricated admission, without any reason being

[1] (2013) 34 *ILJ* 2795 (SCA) at 2806, para [25].

advanced why he would have been so unfairly singled out by the security officers. Although he denied having any interaction with the security officers, he never disputed that the reason the security officers had entered the bakery was because the laptop had been reported missing. Had the arbitrator weighed up the inherent probabilities of each version and compared them, bearing in mind also that the applicant's case rested on the corroborating evidence of two witnesses, it is difficult to see how he could reasonably arrive at a conclusion that the applicant's version was not the more probable one.

Misconstruing the nature of the enquiry.

[11] It is also apparent that the arbitrator effectively required the applicant to prove its case against the third respondent beyond a reasonable doubt rather than on a balance of probabilities. Not only did the arbitrator applied the wrong standard, but also took account of factors not even raised by the third respondent. In focusing on the absence of a written confession or the absence of an entry in the occurrence book, the arbitrator pursued his own interpretation of a possible defence to the charge.

[12] It is important to mention that it is sufficient if an employer adduces enough evidence in support of its case to establish a plausible case. An employer is not required to present the best possible case it could taking into account all the evidence potentially available. Obviously, there is a risk that the evidence it does rely on may be found to be insufficient at the end of the case to prove its case on a balance of the probabilities on a consideration of all the evidence placed before the arbitrator. However, that will only happen if its version is not more probable than that of the employee on all the evidence that was presented. As long as the employer makes out a plausible version supported by evidence and as long as that version is also more probable than that of the applicant, even if it could have made out a better or stronger version[2], it should still succeed on the balance of probabilities.

[2] The so-called best evidence rule which held that a party should produce the best evidence of a fact which the nature of that fact permits is no longer of general application, as confirmed in Conradie J in *Welz v Hall* *1996 (4) SA 1073 (C)* *at 1079C-E:*

[13] The arbitrator ought to have realised that it was unreasonable to have rejected the testimony of the two security guards based on his speculation about why the laptop would have been hidden in a fridge, or his own suspicion that there ought to have been video surveillance footage of the bakery and on drawing an adverse inference from the delay in charging the third respondent in the absence of any evidence suggesting *mala fides* on the part of the applicant and its witnesses. It is true, that the applicant did not call Raol to confirm where he had found the laptop, though it was not in dispute that Raol was the one who appeared to have found it. That is consistent with security officer's testimony that Raol was the person who reported where it was found. It also is plausible that he did report where it was found. The question is to what extent evidence of what he said could legitimately be regarded as part of the evidence the arbitrator properly should have considered.

[14] As it happened, Raol did not testify, so the arbitrator only had the security officers' version of what he said. The fact that the security officers testified that Raol told them he found it in the same place mentioned by the third respondent in his admission to them obviously could be relevant because it tends to prove that the laptop was probably found in a fridge, i.e. its relevance concerns the truth of Raol's statement as corroborating the truth of the contents of the third respondent's admission. However, if it was admitted for that purpose, its admission would be governed by the principles applicable to hearsay evidence, and probably cannot be considered for that purpose.

[15] But the evidence of Raol's statement was also relevant for another, non-hearsay related reason, and that is simply the fact that such a statement was made, not whether it was true or not. The fact that Raol made a

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"As far as the best evidence rule is concerned, it is a rule which applies nowadays only in the context of documents and then only when the content of a document is directly in issue. It provides that the original of a document is the best evidence of its contents. The rule is a very ancient one. It goes back to the Dark Ages, well perhaps the twilight days, before faxes and photocopying machines, when making copies was difficult and such copies as were made often inaccurate. Under those circumstances Courts, naturally, insisted upon production of the original document as being the most reliable evidence of its contents."

See also Zeffert D, et al The South African Law of Evidence, 2003 at 358,

statement mentioning details of the laptop's location which coincided with what the security officer's said the third respondent told them, given that Raol was not present when the third respondent was questioned and therefore could not have known what he told the security officers, is also evidence which tends to corroborate the fact that such admission was made by the third respondent, because it is unlikely Raol would have also mentioned that detail by sheer coincidence. Whether Raol did mention where the laptop was found or not, was a matter to be decided on the probabilities of the two versions. On account of this, while I agree that Raol's statement could have not be legitimately considered for the purpose of proving where the laptop was found, the mere fact that it was made was also relevant to the probabilities of the third respondent having made the admission and could be considered for that purpose.

[16] In summary, the arbitrators misconceived both the primary task of weighing the probabilities of the two versions and the standard of proof applicable to arbitration proceedings. Further, his reasons for dismissing the evidence of the applicant's witnesses as unreliable and untruthful, was both illogical and over-reliant on his own speculative reasoning. Consequently, I am satisfied his award should be reviewed and set aside.

[17] On the question of substituting relief, I am satisfied that, on a balance of probabilities, the third respondent probably did admit to hiding the laptop in a fridge, and that the most probable reason for doing so was to remove it at a later stage. Accordingly, he was guilty of the misconduct he was charged with and dismissal was not an inappropriate sanction given the gross dishonesty involved, irrespective of the other mitigating factors. Such conduct is inherently destructive of the trust relationship.

Order

[18] The arbitration award of the second respondent dated 28 March 2013 issued under case number GAJB 22524-12 is reviewed and set aside.

[19] The second respondent's finding that the third respondent's dismissal was unfair and the consequential relief awarded is substituted with a finding that his dismissal was fair.

[20] No order is made as to costs

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	S Dube of Bowman Gillfillan Inc.
For the Third Respondent:	M Mjeza of SACCAWU