



THE LABOUR COURT OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: JR1168/14

In the matter between:

JOEY AND JERRY'S TRUCKING CC

T/A SPIROS TRANSPORT

Applicant

and

DANIEL KHOSA

First Respondent

COMMISSIONER C.S. MBILENI

Second Respondent

NATIONAL BARGAINING COUNCIL FOR THE

Third Respondent

ROAD FREIGHT INDUSTRY

Heard: 15 December 2015

Delivered: 25 May 2016

Summary: Review of arbitration award – dispute of facts regarding whether there was an application for a postponement at the arbitration – steps to be taken when a record is lost or incomplete – review application dismissed.

JUDGMENT

GWAUNZA, AJ

Introduction

- [1] This is an application by the applicant, Joe and Jerry's Trucking CC trading as Spiros Transport, ("Spiros Transport"), to review and set aside an arbitration award made by the second respondent, ("commissioner"), in terms of which the commissioner held that the dismissal of Mr Daniel Khosa, ("Mr Khosa"), was substantively and procedurally unfair and Mr Khosa was awarded R62 352.00 as compensation.
- [2] Mr Khosa opposes the application.

Background facts

- [3] Mr Khosa was employed by Spiros Transport as a truck driver in January 2013. On 26 August 2013, Mr Khosa received a notice to attend a disciplinary hearing on 3 September 2013 to answer to the allegation that he had stolen company equipment in the form of Suzy Pipes. The disciplinary hearing took place and Mr Khosa was dismissed on 6 September 2013.
- [4] Mr Khosa referred an unfair dismissal dispute to the third respondent, the National Bargaining Council for the Road Freight and Logistics Industry, ("Bargaining Council"). The arbitration took place on 21 May 2014 and the arbitration award is dated 27 May 2014. In terms thereof, the commissioner found that the dismissal of Mr Khosa was procedurally and substantively unfair and Mr Khosa was awarded an amount of R62 352.00.

The review grounds

- [5] Spiros Transport contends that the arbitration award must be reviewed and set aside for the following reasons:

- 5.1. The commissioner did not properly consider the application for a postponement by Spiros Transport on the basis that the chairperson of the disciplinary hearing, Mr Bosch, had been scheduled for surgery on 21 May 2014 and on the basis that the witnesses of Spiros Transport could not be secured for the arbitration. The commissioner did not deal with the issue of prejudice to Spiros Transport and the refusal to grant the postponement caused an injustice to Spiros Transport. Spiros Transport contends that, as a consequence, a gross irregularity in the proceedings occurred. A reasonable decision maker would have granted Spiros Transport a postponement (“Review Ground One”).
- 5.2. The commissioner had prior knowledge of the matter on the date of the arbitration on 21 May 2014 because the issues had been thoroughly ventilated on 17 March 2014, which disadvantaged and prejudiced Spiros Transport in the conduct of the proceedings. Spiros Transport contends that, as a consequence, a gross irregularity in the proceedings occurred (“Review Ground Two”).
- 5.3. The commissioner did not apply his mind to the issues because: (a) he found that the dismissal was procedurally unfair in circumstances whereby the bundle of documents demonstrates that a fair procedure was followed, a disciplinary hearing was held, Mr Khosa participated in the hearing and did not require a representative; (b) a witness confirmed that Mr Khosa had Suzy Pipes on him; and (c) a perusal of the arbitration award reflects that there was no analysis of the facts by the commissioner and he simply quoted case law and came to a conclusion that the dismissal was unfair. A reasonable decision maker would have found the dismissal procedurally and substantively fair in circumstances where Mr Khosa was subjected to a hearing and he was found guilty of theft (“Review Ground Three”).
- 5.4. A reasonable decision maker would not have granted compensation of eight months’ salary in circumstances whereby Mr Khosa had eight months service with Spiros Transport. The commissioner did not follow the arbitration guidelines in granting relief to Mr Khosa and in arriving at the amount of compensation he did. The arbitration award is unenforceable because it states in paragraph 30 that the amount of R62 352.00 is equivalent to seven

months compensation, whereas reference is made to eight months in paragraph 31 thereof (“Review Ground Four”).

5.5. Mr Khosa was assisted by a friend, Mr Jim, who is an official of NUM, to interpret the proceedings in circumstances where he was not an interpreter, he was not neutral and he tailored responses to suit the evidence of Mr Khosa. Spiros Transport contends that, as a consequence, a gross irregularity in the proceedings occurred (“Review Ground Five”).

[6] In opposing the review application, Mr Khosa contends that there was no application for a postponement on 21 May 2014 and that the written confirmation that Mr Bosch was scheduled for surgery on that date, which is annexed to the founding affidavit in this review application, was not presented at the arbitration. Mr Khosa also alleges that Spiros Transport did not object to the role played by Mr Jim at the arbitration and he denies that the commissioner had prior knowledge of the matter as alleged by Spiros Transport. He contends that there was no gross irregularity in the conduct of the arbitration proceedings and he contends that there was a consideration by the commissioner of relevant circumstances and facts. He further contends that the arbitration award is reasonable having regard to the material that was properly placed before the commissioner. Mr Khosa denies that the commissioner did not follow guidelines and he denies that the arbitration award is unenforceable. In this regard, he contends that the seven months referred to in paragraph 30 of the arbitration award is a typing error, particularly if regard is had to the calculations done by the commissioner.

Analysis

[7] It is trite that section 145 of the Labour Relations Act 66 of 1995, as amended, (“LRA”), is suffused by the constitutional standard of reasonableness and the test is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.¹ An application for review on the grounds of misconduct, gross irregularity and/or excess of power is not limited to establishing whether any of these grounds are present but extends to whether the decision was one that a reasonable decision-maker could not have come to and the proper questions to ask in relation to the conduct of arbitrations proceedings are the following: in terms of his/her duty to deal with the matter with the minimum of legal

¹ *Sidumo v Rustenburg Platinum Mines Limited* [2007] 12 BLLR 1097 (CC) at para 106.

formalities, did the process that the commissioner employed give the parties a full opportunity to have their say in respect of the dispute; did the commissioner identify the dispute s/he was required to arbitrate (which could in some cases become clear after the parties have led evidence); did the commissioner understand the nature of the dispute she/he was required to arbitrate; did the commissioner deal with the substantive merits of the dispute; is the decision by the commissioner one that another decision-maker could reasonably have arrived at based on the evidence.²

Review Ground One

- [8] There is a dispute of fact between Spiros Transport and Mr Khosa regarding whether there was an application for a postponement by Spiros Transport at the arbitration on 21 May 2014 and whether the written confirmation of Mr Bosch's surgery on 21 May 2014 was provided at the at the arbitration.
- [9] The recording of the proceedings on 21 May 2014 could apparently not be found. The arbitration award and the commissioner's notes (written and typed) make no reference at all to an application for a postponement and the denial thereof. The written confirmation of Mr Bosch's surgery on 21 May 2014 does not form part of the record that was furnished to the Registrar in terms of the applicable rules and the written confirmation of Mr Bosch's surgery only came to the attention of this Court because it was referred to in the founding affidavit in this review application, albeit not attached thereto, and it was, however, annexed to the replying affidavit herein.
- [10] My finding regarding this ground of review is influenced by the following:
- 10.1. Spiros Transport would have realised upon receipt of the arbitration award on 9 June 2014 that no reference at all is made to the application for a postponement. At this stage and given that Spiros Transport intended challenging the ruling pertaining to the postponement, Spiros Transport should have approached the Bargaining Council to request a written ruling from the commissioner regarding the postponement application. Spiros Transport did not do so.

² *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC) at para 20.

- 10.2. When Spiros Transport uplifted the record from the Registrar, it would have been apparent to it that the written confirmation of Mr Bosch's surgery on 21 May 2014 was not part of the record. Spiros Transport should have approached the bargaining council to notify it that the record was incomplete and to request that Bargaining Council to furnish the Registrar with the missing portions of the record. Spiros Transport did not do so.
- 10.3. Spiros Transport was aware in November 2014, i.e. when the answering affidavit in this review application was served on it, that Mr Khosa denied that there was an application for a postponement on 21 May 2014 and that he denied that the written confirmation that Mr Bosch was scheduled for surgery on that date was presented at the arbitration. At this stage, Spiros Transport should have insisted on (a) a written ruling regarding the postponement from the commissioner or an affidavit from the commissioner dealing with the postponement; and/or (b) a reconstruction of the missing portions of the record so as to reflect that there was an application for a postponement on 21 May 2014, which the commissioner dismissed. None of these steps were pursued by Spiros Transport.
- 10.4. Notably:
- 'A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives ... come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour, to the best of their ability and recollection, to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavour is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to the accuracy or completeness ... When it appeared that there were difficulties with regard to the record, it was the obligation of Lifecare, as the reviewing party, to initiate the enquiries and steps which have been set forth on this judgment. It should not have been left to the Labour Court at first instance, and to this court on appeal, to resolve problems which were other than residual or intractable.'³

³ *Lifecare Special Health Services (Pty) Ltd t/a Ekhuhlangeni Care Centre v CCMA and Others* (2003) 24 ILJ 931 (LAC) at para 17.

10.5. The Practice Manual of this Court enjoined Spiros Transport to approach the Judge President for a direction on the further conduct of the review application if the record of the proceedings under review had been lost or if the recording of the proceedings was of poor quality. According to the Practice Manual, the Judge President would then allocate the file to a Judge for a direction, which might include the remission of the matter to the person or body whose award is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.⁴ Again, none of the aforementioned steps were pursued by Spiros Transport.

- [11] Spiros Transport has not aided its cause in this review application nor has it come to the assistance of this Court insofar as this ground of review is concerned by not taking any of the aforementioned steps. The lack of any explanation by Spiros Transport for not following any of the aforementioned steps is inexplicable, particularly, in light of the fact that Spiros Transport requires this Court to review and set aside a postponement ruling which has not been placed before this Court and in circumstances where there is a dispute of fact regarding whether there was a postponement application at all.
- [12] In the absence of a complete record and a postponement ruling before this Court, and considering the denial by Mr Khosa that there was a postponement application, I cannot grant the order that Spiros Transport seeks in relation to this ground of review.
- [13] In any event, Spiros Transport has not made out a case for the reviewing and setting aside of the postponement ruling even if I was to accept that there was an application for a postponement. The reasons why Mr Bosch needed to be at the arbitration on 21 May 2014 have not been spelt out. Furthermore, the witnesses that Spiros Transport contends that it could not secure for the arbitration on 21 May 2014 have not been mentioned and there is no articulation of the reasons why Spiros Transport failed to secure such witnesses for the arbitration or whether such witnesses were issued with subpoenas. In this regard, it is apparent from the record that the arbitration was postponed on 17 March 2014 to afford the parties time to arrange the presence of witnesses at the arbitration. This was two months before

⁴ *Toyota SA Motors (Pty) Ltd v CCMA and Others* (2016) 37 ILJ 313 (CC) at para 44.

the arbitration on 21 May 2014. Lastly, the reasons why the commissioner dismissed the application have not been provided by Spiros Transport.

Review Ground Two

- [14] The arbitration on 17 March 2014 was postponed to allow the parties to arrange the presence of their witnesses at the arbitration.
- [15] Spiros Transport does not articulate how the commissioner's prior knowledge of the matter disadvantaged and prejudiced Spiros Transport in the conduct of the proceedings or why such prior knowledge constitutes a gross irregularity in itself and, in addition, how such prior knowledge affected the decision the commissioner ultimately arrived at.
- [16] In light thereof, I cannot grant the order that Spiros Transport seeks in relation to this ground of review.

Review Ground Three

- [17] In essence, this review ground relates to the finding by the commissioner that Mr Khosa's dismissal was procedurally and substantively unfair.
- [18] The commissioner was confronted with two conflicting versions at the arbitration:
- 18.1. Ms Pelsler from CATA Employers' Organisation appeared for Spiros Transport and she gave the following testimony, *inter alia*: Fleet 17 driver, Mr Mbonang, reported a case of theft on 21 August 2013 to Mr Dube which led to Mr Khosa being charged with theft of Suzy Pipes. Mr Dube reported that Mr Khosa arrived with Suzy Pipes strapped around his body. Mr Khosa never denied the allegations. Mr Mbonang had no reason to make up the story. Theft is a dismissible offence.
- 18.2. Mr Khosa gave the following testimony, *inter alia*: Mr Khosa was informed by Mr Dube that they were being suspended. Mr Dube stated that Suzy Pipes were stolen and asked if Mr Khosa had a problem with Mr Mbonang and he answered "no". Mr Dube told Mr Khosa that Mr Mbonang told him that he had

stolen Suzy Pipes and wrapped them around his body. Mr Mbonang was lying because it is impossible to roll Suzy Pipes around the body because they are big.

[19] In dealing with the conflicting versions, the commissioner stated the following:

- 19.1. None of the people who were involved at the disciplinary hearing appeared at the arbitration, including the complainant (Mrs Martens), the presiding officer (Mr Bosch), Mr Mbonang and Mr Dube, who is a manager.
- 19.2. Ms Pelsler did not attend or play a role at the disciplinary hearing and, during the arbitration, she relied entirely on documents which were authored by other people as if the documents were the truth.
- 19.3. A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must be corroborative evidence, if any. Evidence of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.
- 19.4. Spiros Transport used Mr Mbonang as the main witness in the dismissal of Mr Khosa. Failure by a party to bring its only witness to testify constitutes grave injustice to the other party. Evidence read from a prepared statement is not necessarily inadmissible, *per se*, but little weight should be given to it. The credibility of Mr Mbonang who gave a written statement could not be tested due to his non-appearance at the arbitration. Mr Khosa was entitled to cross-examine Mr Mbonang and challenge allegations that led to his dismissal. A commissioner can refuse to admit evidence if an employer does not give a satisfactory explanation for not leading the 'best evidence' – i.e. the testimony of an eye witness.

[20] In light of the foregoing, the commissioner found that he had no reason to reject Mr Khosa's version and he found, on a balance of probabilities, that Mr Khosa's dismissal was unfair.

- [21] Given that dismissal was common cause, Spiros Transport had the onus to prove that the dismissal was fair. Spiros Transport sought to discharge that onus through the evidence of Ms Pelsler who, as the commissioner rightly noted, did not attend the disciplinary hearing and she therefore did not play a role at that disciplinary hearing. In the main, Ms Pelsler related what happened at the disciplinary hearing from the documents that she had in front of her. Her evidence was hearsay and, in my view, it was unreliable. None of the witnesses, including the complainant (Mrs Martens), the presiding officer (Mr Bosch), Mr Mbonang and Mr Dube, as the commissioner again rightly noted, were called to give evidence at the arbitration. It will be remembered that Mr Mbonang is the person who apparently saw the theft and reported it to Mr Dube. His evidence was critical if Spiros Transport was to discharge its onus insofar as substantive fairness is concerned. Without these people giving evidence at the arbitration, Mr Khosa could not cross examine them and the commissioner could not assess their credibility and/or reliability. It is in these circumstances that the commissioner found no reason to discount Mr Khosa's version and he decided that Spiros Transport had not discharged its onus and that, on the probabilities, Mr Khosa's dismissal was fair. In so doing, the commissioner referred to authorities dealing with, *inter alia*, the admission, weight, quality and reliability of evidence.
- [22] In my view, the decision reached by the commissioner is not one that a reasonable decision-maker could not have come to.

Review Ground Four

- [23] The commissioner stated in the arbitration award that he had carefully considered Mr Khosa's period of employment and the period in which he had been out of employment when the arbitration was finalised in arriving at his decision to award him compensation of eight months' salary amounting to R62 352.00.
- [24] It would seem that Mr Khosa was employed for approximately eight months and, when the arbitration was finalised, he had been out of employment for approximately eight months. In light of the fact that the primary remedy for a substantively unfair dismissal is reinstatement and further that the dismissal was also found to be procedurally unfair, the decision to award Mr Khosa eight months' salary as compensation is reasonable, just and equitable.

- [25] Quite evidently, the reference to seven months in paragraph 30 is an error that is neither here nor there.
- [26] Again, Spiros Transport does not particularise what, in relation to the “guidelines” was not followed by the commissioner and how and why that renders the decision of the commissioner reviewable as one that is not reasonable.

Review Ground Five

- [27] It is recorded in the arbitration award by the commissioner that Mr Khosa was assisted by his friend, Mr Jim, who is a NUM official, to interpret the proceedings for him. It would seem that Mr Jim is not an interpreter by trade who was employed by the bargaining council to perform that function.
- [28] The use of Mr Jim as an interpreter was irregular. Evidence must be interpreted by a competent person appointed for that specific purpose if there is a requirement for an interpreter.
- [29] Be that as it may, I must still consider whether, notwithstanding the irregularity, the decision of the commissioner was one that a reasonable decision-maker could not have come to with regards to the factors listed in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (supra)*. For the reasons set out above in relation to the first to fourth grounds of review, I find that, regardless of the irregularity, the decision of the commissioner is not one that a reasonable decision-maker could not have come to.
- [30] I have also taken into account the fact that Spiros Transport did not object to the role played by Mr Jim at the arbitration and the fact that Spiros transport has not provided any particularity regarding how and in what respects Mr Jim was not neutral, how and what respects he tailored responses to suit the evidence of Mr Khosa and how Mr Jim affected the decision the commissioner ultimately arrived at.

Conclusion and costs

- [31] In light of the above, the decision reached by the commissioner is not one that a reasonable decision-maker could not have come to.

[32] I must exercise a discretion in terms of section 192 of the LRA in considering whether to award costs. I see no reasons why costs should not follow the cause in this matter.

Order

[33] For the above reasons, I make the following order:

1. The application to review and set aside the arbitration award issued by the second respondent is dismissed.
2. The Applicant is ordered to pay the First Respondent's costs.

Gwaunza, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate Gishatha Singh

Instructed by: Yusuf Nagdee Attorneys.

For the First Respondent: Mr Sello Seepamore

Instructed by: Mohlaba & Moshwana Inc.

LABOUR COURT