Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2630/12

In the matter between:

NUM obo MOGASHOA **Applicant**

and

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

MACGREGOR, R (*N.O.*) **Second Respondent**

RAND REFINERY LTD **Third Respondent**

Heard: 18 February 2016

Delivered: 23 February 2016

Summary: (Review – dismissal – outcome in award sustainable on the evidence before the arbitrator - dismissed)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review application to set aside an arbitrator's finding that the dismissal of the applicant was substantively and procedurally fair. On his own account, the applicant claims he was dismissed for two charges, namely:

1.1 Gross negligence or dishonest conduct in that you must have been aware or noticed that 17 kg of gold was hidden in the workshop yet you failed in any way to report this to management or to take any action to remedy the situation.

1.2 Dishonest conduct in that you must have been reasonably aware and/or were involved in attempted theft of gold that was hidden in weights that you assisted to weld closed.

[2] The disciplinary action came about when management at the Gold refinery received a tipoff that gold had been concealed inside weights that were supposed to be scrapped. It was common cause that the boilermaker and the applicant, his assistant, had done welding work on the weights in question on a Sunday for which they had been paid overtime. Thereafter the weights had been moved to the instrument technician's workplace en route to being scrapped. The weights were opened where they were found in the technician's workshop and approximately 8 kg of gold was found in compartments in the weights. The only employees engaged in welding at the refinery was the applicant and the boilermaker, and it was a rule at the refinery that no equipment at the plant could have closed compartments. The weights had been modified and metal plates had been welded over the handles and there was no inspection hole provided. The applicant admitted to grinding the welds on the weights and painting them, but denied any knowledge of how the gold came to be placed inside them. Following the discovery of the gold in the tampered weights, management retraced the passage of the weights through the plant and to the technicians' workshop and a search was conducted in the boilermaker's workshop, which led to the discovery of a hessian bag containing another 17 kg of gold concealed by a large cupboard.

[3] The arbitrator did not expressly state whether he found the applicant guilty of both charges. However, it is clear in the course of his analysis of the evidence that he was satisfied that given the size of the workshop and the position of the cupboard the applicant could not have been unaware of the bag containing the gold and failed to report it, which is the same as a finding of guilt on the first charge. Secondly, the arbitrator made an adverse credibility finding against the applicant on the basis that he concluded that the photograph of the cupboard he had presented at the arbitration was not the same as the cupboard seen at the *in loco* inspection in the boilermaker's workshop, and that the photograph accordingly amounted to a misrepresentation which affected the credibility of his version. Thirdly he found that it was unlikely that anyone would have entered the workshop without the knowledge of the applicant and the boilermaker and that they would both have been focused on the work at hand on the Sunday in question. He found that in all probability, the gold had been placed in the compartments in the boilermaker's workshop and that the applicant must at least have been aware of the gold been placed in the compartments.

[4] During the course of the arbitration, a controversy arose over the dimensions of the cupboard and both parties submitted photographs of the object in question. The arbitrator then conducted an *in loco* inspection of the boilermaker's workshop and the parties were asked to comment on their observations when the arbitration resumed. One of the complaints against the arbitrator is that he took account of observations made by a company representative who conducted the *in loco* inspection, without that person giving evidence at the arbitration or being sworn in. Undoubtedly, the arbitrator ought not to have paid attention to his statements during the *in loco* inspection in the absence of him confirming the same in the arbitration proceedings itself, especially if the employee did not have an opportunity to test those statements. One pillar of the applicant's review concerned the conflicting evidence of whether, as the person who was responsible for cleaning the boilermaker's workshop he would have necessarily been aware of the bag of gold concealed by the cupboard.

[5] The test for review on the basis of errors made by an arbitrator in the evaluation of evidence or in the conduct of proceedings has been formulated in a number of ways in recent decisions of the LAC. In **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others**[1]

[6] … the court held:

> "[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork."[2]

(emphasis added)

[7] Further, in ***Head of the Department of Education v Mofokeng and others***[3] the court emphasised the extent an arbitrator's approach must be wrong to upset an award on review:

> "Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no

[1] **(2014) 35 *ILJ* 943 (LAC)**

[2] At 950.

[3] [2015] 1 BLLR 50 (LAC)

reasonable decision-maker could reach on all the material that was before him or her."[4]

[8] On the issue of the weights to be attached to the arbitrator's own reasoning in evaluating the reasonableness of an award, the SCA in ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***[5] had the following to say:

> "That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."[6]

(emphasis added)

[9] Much of the substantial criticism directed at the award concerns the arbitrator's handling of the *in loco* inspection and the fact that he placed reliance on statements made by the management representative who never testified subsequently in the hearing. I agree that to the extent the arbitrator took account of statements made by that individual in the course of the *in loco* inspection without them being corroborated or confirmed in evidence by others on the record, amounted to a procedural irregularity which might have prejudiced the applicant because he was unable to cross-examine that individual.

[10] Nevertheless, even if I discount the arbitrator's findings based on the *in loco* inspection, particularly those relating to the concealment of the bag containing gold, there was ample evidence to reasonably support a

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[4] At 60, para [32].

[5] **(2013) 34 *ILJ* 2795 (SCA)**

[6] At 2802, para [12].

conclusion that it would have been improbable that the gold would have been placed in the weights anywhere else other than in the boilermaker's workshop and that the applicant could not have been aware of the gold been placed in the illicit compartments created on the weights. Even though the gold in the weights was only discovered when they had been transferred to the technician's workshop, it was also not unreasonable to draw an inference that it was unlikely that the weights would have been cut and re-welded after the work done when the applicant and the boilermaker were on duty on the Sunday in question. Even if there might have been other legitimate boiler-making work to perform in the boilermaker's workshop on a Sunday at overtime rates, there was no plausible explanation offered as to why welding work on weights, which were due to be scrapped, would have warranted such priority. The applicant himself agreed that Sunday work was not a common occurrence.

[11] In the circumstances, I am satisfied that when the evidence is considered in its totality, it was more than plausible for the arbitrator to arrive at the conclusion that the applicant was at the very least probably aware of the concealment of the gold in the weights which most probably occurred when they were working on the weights that Sunday. Even if he was merely a bystander, his silence in not reporting the concealment of the gold made him complicit with the boilermaker who was dismissed arising from the incident. The strong circumstantial evidence against him was such that he needed to provide a plausible explanation why, notwithstanding that evidence, he was not a participant or would not have been aware of what was going on despite working together with the boiler-maker that day in the small workshop.

[12] Plainly, the applicant's complicity in subterfuge of this sort is incompatible with the trust required in an employment relationship especially in an environment dealing with a valuable commodity. Consequently, it cannot be said his dismissal was substantively unfair.

[13] There was no serious challenge on the pleadings in the review to the finding of procedural fairness raised, so that finding remains effectively

unchallenged. I also do not consider it necessary to deal with grounds of review raised in argument for the first time.[7]

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[7] In **Commercial Workers Union Of Sa v Tao Ying Metal Industries & Others (2008) 29 *ILJ* 2461 (CC)** at 2483, par [67], the Constitutional court stated unequivocally:

> "A party who seeks to review an arbitral award is bound by the grounds contained in the review application."

Also in ***Comtech (Pty) Ltd v Moloney NO and others*** ***(DA12/05)*** **[2007] ZALAC 35 (21 December 2007**), the LAC emphasised the importance of setting out the factual basis of grounds of review in the founding papers:

> "[15] The difficulty with the appellant's case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A(2)(c) of the Rules of the Labour Court. Rule 7A(2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by "an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside." Rule 7A requires the notice of motion to call upon, in this case, the commissioner "to show cause why the decision or proceeding should not be reviewed and corrected or set aside."
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> [16] In my view, the contents of par 15 of the founding affidavit relate to conclusions of law. There is nothing either in par 15 or anywhere else in the founding affidavit which sets out the factual grounds upon which the appellant sought to base its legal grounds of review. In par 15 of the founding affidavit the deponent said that the commissioner erred in his award in that he "failed and or neglected and/or refused to apply his mind to the evidence led at the arbitration proceedings" but did not motivate this bald allegation by reference either to the evidence or the award."

See also *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 *ILJ* 3045 (LC) at 3048-9, where I alluded to the importance of the founding papers containing the grounds of review, viz:

> "[5] Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party's case is canvassed. In the case of a

Order

[14] The review application is dismissed.

[15] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

review application an applicant has the added advantage that a weak founding affidavit can be completely replaced or augmented by a supplementary affidavit. It is at that point of the applicant's preparation of the application that it must focus its mind on the merits of its case. It should not regard the supplementary affidavit as merely a preliminary exploration of issues to be more fully developed when heads of argument are prepared."

APPEARANCES

APPLICANT:	B Matyolo instructed by K D Maimane Inc.
THIRD RESPONDENT:	R J C Orton of Snyman Attorneys