REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 644/15

In the matter between:

Feziwe Victoria KHUMALO	Applicant
and	
SALGBC	First respondent
Charles JACOBS N.O	Second respondent
CITY OF CAPE TOWN	Third respondent

Heard: 8 February 2017
Delivered: 13 February 2017

SUMMARY: Review – misconduct – dishonesty and insubordination. Award reasonable. Dismissal fair. Application dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Ms Khumalo, was employed by the City of Cape Town (the third respondent). The City dismissed her after she was found to have acted dishonestly and that she was insubordinate. She did not attend her disciplinary hearing.

[2] She was dissatisfied. She referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the first respondent). The arbitrator (the second respondent) found that the dismissal was fair. The employee now seeks to have that award reviewed and set aside in terms of s 145 of the LRA.[1]

Background facts

[3] The City dismissed the employee because she was absent from work on a number of occasions without permission and then lied about it. She was also on a final written warning for insubordination, and at her disciplinary hearing it was found that she had again been insubordinate.

[4] The allegations about her absence from work stem from a number of occasions where she would report for work in the morning, but then disappear for long periods of time. The following facts, usefully summarised by Mr *Ackermann* in his heads of argument, are common cause:

4.1 The employee had an access card which recorded her movements entering and exiting the building as well as her movements inside the building.

4.2 A biometric system using her fingerprint allowed access to the underground parking lot in the Civic Centre.

4.3 The employee drove a silver Honda CRV. Video footage of such a vehicle entering and exiting the parking lot was shown at the arbitration.

[1] Labour Relations Act 66 of 1995.

4.4 The employee admitted that she was the person captured on a surveillance video of the parking area, having first denied it and claiming that it was a person with "similar features".

4.5 When entering the parking lot, the employee was captured on video walking towards a silver Honda CRV on the date in question when the city alleges she left the workplace without permission. The video footage shows the Honda being driven out of the parking lot.

4.6 On one of the days in question, the video footage shows the applicant arriving in the parking lot with her child. At the arbitration, she at first denied that it was a child but later admitted that it was.

The arbitration award

[5] The arbitration was a lengthy one. It ran over 16 days. The employee was represented by Mr Yisaka, a SAMWU trade union official. Throughout the proceedings, bar the first day. The transcript comprises more than 400 pages. The award is a detailed one, itself comprising 59 pages.

[6] The arbitrator dealt with each of the allegations of absence from work, having heard the evidence of Ms Viljoen, Ms Mamputa, Mr Maxwell, Mr Da Silva, Ms Jansen, Mr Phillips and Ms Harvey for the City; and that of the employee and, on her behalf, Mr Hopa. There were various factual disputes. The arbitrator resolved those disputes in the fashion set out by Nienaber JA in *Stellenbosch Farmers' Winery.*[2] He considered the credibility of the witnesses, their reliability, and the probabilities. He made the following factual findings on a balance of probabilities:

8 October 2010

[7] The arbitrator concluded on a balance of probabilities that the employee had been absent for about four hours on this day. He came to this conclusion based on the following facts:

7.1 The employee made no landline calls during this period. She did not dispute the telephone records.

[2] *Stellenbosch Farmers Winery Group Limited v Martell et cie* 2013 (1) SA 11 (SCA) para 5.

7.2 Ms Harvey, the City's witness, saw and recorded the employee leaving and returning during working hours.

7.3 The video footage showed a silver Honda CRV entering the Civic Centre at 16:03.

7.4 The city's "users tracking access report" showed the employee leaving the building at podium ground floor, Foyer D, parking exit 2 at 11:00 and returning at 16:07. The employee provided no evidence that it was not a reliable system.

7.5 It was improbable that the employee spent a lot of time waiting for someone else to swipe the doors so she could enter without using access card, as she testified at arbitration. After all, she had her own access card.

7.6 The employee's movements directly corresponded with the movements as shown on the video footage relating to her car. On a balance of probabilities the silver Honda CRV was her car and she was the person driving it. It is highly improbable that another employee used car exactly like hers, drove it at those times, and looked exactly like the applicant.

17 November 2010

[8] The allegation was that the employee left her workstation for about two hours while she was getting paid for working. The arbitrator agrees, on a balance of probabilities, taking into account that:

8.1 The facts supported Ms Harvey's evidence that the employee had asked her to cover for her while she was "quickly going to Clicks";

8.2 The telephone records show that the employee did not make any calls between 11:07 and 13:21. On the probabilities, she was not in her office.

7 October 2010

[9] The allegation was that the employee left her workstation for about two hours. The arbitrator found:

9.1 The user tracking report confirmed that the employee swiped her access card at 10:25 exiting at Podium first floor, Foyer D. A minute later, the video footage shows her going to the side of the parking area where her Honda is parked. Another minute later, the Honda leaves the parking area.

9.2 Ms Harvey testified that she did not see the employee between 09:30 and 12:35.

9.3 The City's telephone records show that the employee made no phone calls between 10:25 and 12:30.

6 October 2010

[10] The City alleged that the employee pretended through the City's clocking system that she had worked until 17:18. In fact, she left at 13:20 and only returned to clock out at about 17:28. The arbitrator found on a balance of probabilities that this was correct:

10.1 The employee swiped her access card and exited the building at 13:12. Her Honda only entered the parking area again at 17:22. The video footage then shows the employee walking with her son in the direction of the access doors at Foyer D, first floor.

10.2 Phillips testified that the employee's hair was different when she returned compared to when she left. On the probabilities, she had gone to get her hair done and to have extensions added.

Insubordination

[11] The allegation was that the employee was insubordinate during the period 20 September – 15 December 2010 because she failed to comply with the instructions issued by her manager, Ms Carin Viljoen, requiring her to copy her (Viljoen) in on all weekly meetings.

[12] The instruction was to copy Viljoen in on the employee's Outlook calendar. The arbitrator accepted Viljoen's evidence. It was consistent and clear, as opposed to the contradictory evidence of the employee.

[13] The employee was guilty of insubordination. She had a previous written warning for gross insubordination, issued on 3 June 2010. On this incident of misconduct alone, misconduct was the appropriate sanction, in line with the principle of corrective discipline.

Procedural fairness

[14] The employee claimed that the disciplinary process was procedurally unfair. After three postponements at her request, the hearing proceeded in her absence.

[15] The arbitrator referred to *Avril Elizabeth Homes*[3] in considering this complaint. He considered the following elements of procedural fairness:

15.1 An investigation was conducted by the City into the alleged misconduct;

15.2 the employee was given an opportunity to respond;

15.3 she was given a reasonable time in which to do so;

15.4 she was given the opportunity to be represented by a fellow employee or trade union official;

15.5 the City made a decision and conveyed it to her.

[16] The employee was notified of a disciplinary hearing scheduled for 10 January 2011. It was postponed because she was on leave. It was reconvened on 31 January. Then it was postponed to 24 February at her request, as she was booked off sick for depression. On 24 February she was again booked off for depression. Her representative, Pontac, attended. The chairperson advised all parties that the hearing would continue on 8 March. Neither Pontac nor the employee arrived on that day. She says she sent a medical certificate. No-one received it. The arbitrator found that there was no good reason to postpone again. The employee did not call Pontac as a witness at arbitration, despite having indicated that she would. She sent an email with the medical certificate to Pontac after the hearing. He forwarded it to the City the day after the hearing had been concluded. The procedure was fair.

[3] *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC).

Inconsistency

[17] The employee argued that the City had acted inconsistently by not dismissing another employee, Clifford Reid, who had also left the workplace during working hours to conduct private business. Reid was accused of dishonest conduct and called to a disciplinary hearing. The chairperson found that the City had not proven the misconduct related to dishonesty. There was no inconsistency.

Sanction

[18] In considering whether dismissal was a fair sanction, the arbitrator took into account the principles in *Sidumo.*[4] He considered that the employee had worked for the City for 16 years and that she had a final written warning for gross insubordination that had been issued less than six months previously. Viljoen had testified that the trust relationship had broken down. The employee had neither performed her duties with good faith or with honesty. The City's disciplinary code identifies dishonesty as good cause for dismissal. The City's time and attendance procedures clearly states that, if an employee cannot work a full shift, she must obtain permission from her supervisor. The employee did not get such permission. And even after being confronted by management she continued to defy management and persisted with her misconduct. She showed no remorse, instead exhibiting "an aura of arrogance" in presenting her case. She unjustly accused the City of racism. Dismissal was a fair sanction in the circumstances.

Grounds of review

[19] The grounds of review raised by the applicant are more akin to appeal than review. Despite having set out the trite law with regard to the reasonableness test for review as outlined in *Sidumo*[5] and *Gold Fields*[6], Mr *Garces* submitted that the arbitrator "should have found":

[4] *Sidumo v Rustenberg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[5] Above.

[6] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).

19.1 that the employee's version was probable;

19.2 that the policy relating to timekeeping was not known to all employees;

19.3 that the evidence relating to the video footage, telephone calls and swipe cards was "fraught with inconsistencies";

19.4 that the video evidence relating to the employee's Honda CRV was based on assumptions;

19.5 that the evidence relating to absence from work was based on assumptions;

19.6 that the allegation of insubordination "was based on the assumption that the applicant had attended meetings during the four days in question and that applicant did not attend the meetings, she could not have transgressed any workplace rule as alleged";

19.7 that the disciplinary hearing was procedurally unfair and that it should have been postponed yet again.

[20] Mr *Garces* also submitted that the arbitration hearing was procedurally unfair; that the arbitrator was biased; and that the arbitrator failed to consider material facts which rendered the outcome unreasonable.

Evaluation

[21] in considering the review grounds, I shall deal with them under the following broad rubrics:

21.1 procedural fairness;

21.2 bias;

21.3 credibility;

21.4 dishonesty;

21.5 insubordination; and

21.6 sanction.

Procedural fairness

[22] The allegation of procedural fairness at the disciplinary hearing is quickly disposed of. The arbitrator carefully considered the evidence and the principles outlined in *Avril Elizabeth Home*. The disciplinary hearing had been postponed three times. The employee's representative, Pontac, did not attend the hearing on the final date. Neither did the employee. Neither of them furnished the City with a medical certificate beforehand. It was reasonable of the city to proceed with the hearing in her absence. That conclusion by the arbitrator is not so unreasonable that no other arbitrator could have come to the same conclusion.

[23] The further allegation is that the arbitration itself was procedurally unfair. That is based on allegation that the arbitrator "failed to allow the applicant to obtain proper representation". The only basis for that is that, on the first day, the arbitrator would not allow one Freddie to represent her. Freddie was not entitled to represent her in terms of rule 25(1)(a)(ii) of the CCMA rules. She was not a member of SAMWU. Nevertheless, for the remaining 16 days of arbitration it was agreed that she could be represented by another SAMWU official, Mr Stanley Yisaka. There was no prejudice to her.

Bias

[24] Mr *Garces* did not seriously pursue the allegation of bias in his oral argument. Nevertheless, it is contained in his heads of argument. The only basis for that argument is that the arbitrator "acted with clear malice and bias towards the applicant by the admission of irrelevant evidence that was not relevant in the totality of the evidence placed before him". It is also argued that the arbitrator did not find that the City's actions "were clearly intentional and prejudicial towards the applicant". And generally, there is an allegation that the arbitrator did not come to the employee's assistance throughout the arbitration process.

[25] These allegations are groundless. On a thorough reading of the transcript of the arbitration, comprising more than 400 pages, one is left with the impression that it is the employee who was aggressive and uncooperative

during the arbitration; the arbitrator, on the other hand, acted with restraint and in an unbiased manner. No apprehension of bias is discernible, applying the test in *President of the RSA v South African Rugby Football Union*.[7]

Credibility

[26] The arbitrator made a credibility finding against the employee. As Mr *Ackermann* pointed out, a court will be slow to interfere with credibility findings made by a lower tribunal.[8]

[27] The arbitrator carefully considered the credibility of the witnesses, their reliability and the probabilities, applying the principles set out in *Stellenbosch Farmers' Winery*.[9] Having regard to the employee's testimony and attitude at arbitration, his conclusion was not unreasonable.

Dishonesty

[28] The arbitrator's findings with regard to the allegations of dishonesty, set out above, were entirely reasonable, given the evidence before him. The facts were neatly summarised by the City's witness, Mr De Silva:

> "I think what is of fact is that Ms Khumalo does own or owned a silver Honda CRV at the time. That is a fact. What is a fact is that the parking bay where the camera coverage is, in which direction that vehicle moves, is where Ms Khumalo, the one that Ms Khumalo is being allocated to. What is a fact is that the tracking of the movement shows Ms Khumalo leaving at the time and shortly thereafter the vehicle leaves. What is a fact is that when the vehicle comes back, it proceeds that very same way. What is a fact is that the entry into the building is again Ms Khumalo entering with her access card which was issued to her. What is a fact is that Ms Khumalo's colleagues have no knowledge of her whereabouts at the time.
>
> So while Ms Khumalo is correct in saying that she is not the only person with a silver vehicle, the balance of probabilities certainly say that that silver Honda that leaves there is Ms Khumalo's vehicle."

[7] 1999 (4) SA 147 (CC) para 48.

[8] Cf *NUM v CCMA* (2013) 34 *ILJ* 945 (LC) para 31.

[9] Above para 5.

[29] The evidence, taken holistically, was clear. It need not be summarised again. The arbitrator did so in detail. He came to an entirely reasonable conclusion on a balance of probabilities, given the facts and the evidence before him.

Insubordination

[30] Ms Viljoen ordered the employee to inform her – via the simple instrument of copying her in on her Outlook calendar – of the meetings she attended. Yet the employee, who was already on a final written warning for insubordination, wilfully defied this instruction.

[31] Viljoen's evidence was clear and mostly uncontested. She had twice told the employee that she was to inform her (Viljoen) personally if you could not be at work, and to copy her in on any appointments or meetings. The employee did not do so. Viljoen also gave uncontested evidence of meetings which the employee attended without informing Viljoen or copying her in. Those included the SALGA and portfolio committee meetings, the corporate services portfolio committee meeting and the Khayalitsha workshop.

[32] The arbitrator reasonably found that the employee was guilty of insubordination.

Sanction

[33] As the arbitrator pointed out, dismissal would have been a fair sanction on either of the two instances of misconduct, i.e. dishonesty or insubordination. The employee was guilty of both.

[34] The arbitrator nevertheless carefully considered the factors outlined in *Sidumo* before coming to the conclusion that dismissal was a fair sanction. That was a reasonable conclusion.

<u>Conclusion</u>

[35] The award is not reviewable. The arbitrator carefully considered all the facts and the evidence. Applying the principles set out in *Stellenbosch Farmers' Winery*, he came to a reasonable conclusion on a balance of

probabilities. Having concluded that, on the probabilities, the employee had committed the misconduct, he came to a reasonable conclusion that the dismissal was fair, taking into account the factors outlined in *Sidumo*.

[36] With regard to costs, I take into account that there is no longer any relationship between the parties; and that the applicant pursued a review application in circumstances where the matter should have been finalised at the arbitration stage. Both parties were represented by counsel. There is no reason in law or fairness why she should not pay the City's costs, including the costs of counsel.

Order

The application for review is dismissed with costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Michael Garces
Instructed by	Turner Ntshingana Kirsten.
THIRD RESPONDENT:	Lourens Ackermann
Instructed by	Bradley Conradie Halton Cheadle.