THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR452/16

In the matter between:

CASHBUILD SOUTH AFRICA (PTY) LTD **Applicant**

and

COMMISSION FOR CONSICIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER FOURIE A **Second Respondent**

ITUMELENG K A **Third Respondent**

Heard: **21 July 2017**

Delivered: **29 August 2017**

Summary: The conduct of the Commissioner-not considering all the relevant facts, made the award reviewable

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JUDGMENT

KRUGER A J.

Introduction

[1] This is an application to review and set aside an arbitration award issued by the second Respondent (the commissioner) on 26 January 2016.

[2] The third Respondent was employed as a trainee manager. He earned a salary of R13 119.03 per month.

[3] The Applicant dismissed the Third Respondent on 14 October 2015.

Factual Background

[4] On 9 September 2015, the Applicant sent an email to the third Respondent and other managers reminding them of their duties.

[5] On 14 September 2015, there was stock take and the Third Respondent worked administrative duty until 18 September. On 18 September 2015, the Third Respondent went on leave and on 23 September 2015, a certain Pejane, the divisional manager of the Applicant visited the store. Because of this store visit the Third Respondent and the other managers were charged for misconduct.

[6] The Third Respondent was dismissed for Gross Negligence in that:

" On 11th of September you failed, without proper cause to perform your duties with the proper care required in that you failed to carry out the above mentioned duties"[1] The duties were as follows -

a. " The managers desk together with the sales coordinators desk must be clean and no papers lying around;

b. There must be no gaps in the store expect where there is no stock on hand;

c. All stock to have correct pricing;

d. All Plano – grams must be fully implemented;

e. All bulk boxes to have correct template of the stock inside the box and must be neatly packed;

f. Floor to be clean and be free of obstruction of stock to customer and to staff;

[1] See page 38 of the record in the disciplinary hearing the Chairman states it as follows – *"There were no evidence submitted that they deliberately failed to follow the instructions, they never indicated in person that they do not want to follow the instructions, however they failed to follow the instructions as would have been expected from a reasonable manager in their position"*

g. Yard to be clean at all times;

h. GRS offices must be clean and there should be no stock in the receiving expect the stock to be received for the specific day;

i. Kitchen and toilets must be clean at all times and the roster must be daily completed and be signed off;

j. RFB checklist must be completed by the relevant staff and be signed off by management on a daily basis;

k. No queues at the till points"

The arbitration proceedings and the award

[7] In paragraph 5 of the award the Second Respondent stated that she regretted the fact that she allowed legal representation. She stated that Mr. Orton was not prepared and for that reason irrelevant evidence were presented at the arbitration. Mr. Orton also wanted to reopen his case after it was already closed.

[8] In paragraph, 47 of the award the second respondent made the following finding –

> "*It was not in dispute that the store was found in disarray on the 23rd of September 2015. It was further not in dispute that the three Managers and the System Supervisors all shared one desk. This could naturally cause problems to assign responsibility if something went missing from the desk or if the desk was found in disarray as in this case appeared to be the situation"*

[9] The second Respondent noted in paragraph 48 of the award that the Applicant took disciplinary action against all the managers and that all the managers were dismissed.

[10] In paragraph 49 of the award the second Respondent made the following finding-

"*I am not suggesting that that the Trainee Managers had no responsibilities, but I am of the view that the degree of negligence in the sense of failure to comply with their*

duties and responsibilities in the case of the Store Manager and the Trainee Manager differ.

[11] The Second Respondent found that the Third Respondent was not entirely to be blamed for the shortcomings that were found on 23 September 2015. In paragraph, 56 she found that –

> "*I do acknowledge that the employee could have applied his mind and reported the shortcomings to the Divisional Manager or that he could take initiative and see to it that that the shortcomings were addressed on the store. However that would ultimately be the responsibility of the Store Manager"*

[12] The Second Respondent then found that the Applicant failed to prove that the Third Respondent was grossly negligent and that a final written warning would have been sufficient. The Second Respondent ordered reinstatement without back pay.

Grounds for Review

[13] The Applicant contends that the Second Respondent committed misconduct in relation to her duties and that she committed a gross irregularity rendering the award reviewable. The Applicant relies on the following grounds:

> " a..... the second respondent was biased in favour of the third Respondent at the expense of the Applicant.
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> b. The second respondent misconceived the nature of the inquiry and thereby committed a gross irregularity; and or
>
> c..... Committed gross irregularities in failing to apply her mind properly to the evidence and / or to properly evaluate the evidence and / or making material factual and legal errors; and or
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> d Misconduct in the execution of her duties; and or
>
> e Arrived at a decision that no reasonable commissioner could have arrived at and thereby acted grossly irregular.

Analysis

First Respondent was bias in favour of the third Respondent at the expense of the Applicant.

[14] Mr. Pejane took issue with the fact that the Second Respondent mentioned that she regretted allowing legal representation and that she felt that Mr. Orton was not properly prepared. Pejane further stated that the fact that she *"ridiculed a perfectly sound argument made by Mr. Orton by shrugging it of as amusing"*[2] meant that because of her dislike in Mr. Orton her judgement was clouded; and that she was therefore biased in favour of the Third Respondent.

[15] In *President of the Republic of South Africa & Others v South African Rugby Football Union* [3]the Constitutional court stated that –

> "*The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of council"*

[16] The Applicant did not take issue with the Second Respondent's conduct during the proceedings but with what was said in her award. The fact that a commissioner mentioned in her award that she regretted allowing legal representation and that according to her the representative was not properly prepared does not mean that her dislike in the representative clouded her judgement. Even if her reasoning in paragraph, 55 of the award regarding the planning was wrong; and if her words "*I find it amusing"* was unfortunate; this does not mean that she was biased.

[17] The Second Respondent considered all the evidence. She made adverse findings against both the Applicant and the Third Respondent. I am not convinced that the Applicant was not afforded a fair hearing because of the conduct of the Second Respondent. For these reasons, this ground of review must fail.

Applicant's arguments with regard to the rest of the grounds of review

[2] Page 28 paragraph 6.39
[3] 1999 (4) SA 147 (CC)

[18] The crux of the Applicant's case[4] is that Store Management, which includes the Applicant, had a shared responsibility to ensure that the store standards were met. On 9 September, the Managers signed Pejane's email and did nothing to action it. In other words, they did not plan accordingly. If proper plans were in place, then issues discovered by Pejane on 23 September would not have ensued.

[19] The Second Respondent out of her own reduced the Third Respondent's culpability because he was a Trainee Manager. This was not part of the Third Respondent's defence.

[20] Mr. Orton argued that when the Third Respondent testified that there was a plan; there was a shifting in the evidentiary burden[5] and the Third Respondent had the duty to produce such a plan. The Third Respondent could not produce such a plan.

[21] The Second Respondent did not consider all the relevant facts when she concluded that dismissal was not an appropriate sanction. Mr. Orton argued that reinstatement is not practical because the trust relationship was destroyed. He argued that because of shrinkage, the Applicant was forced to act and to dismiss the Managers.

Analysis

[22] In *Goldfields Mining SA v CCMA*[6] the court stated that –

> "…….. the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to proses related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the

[4] I have read the entire heads of argument but I record only that that was relevant for purposes of this judgement

[5] See *Woolworths (Pty) Ltd v CCMA (2011)32 ILJ 2455 (LAC*) The DVD footage evidence established, in my view a prima facie case of concealment and, therefore, an element of dishonest interaction on the part of the employee, which then shifted the evidentiary burden to her to present such evidence as would exonerate her from blame in this regard.

[6] (2014) 1 BLLR 20 LAC at paras 17 -18

> decision made by the arbitrator is one that a reasonable decision maker could make"

[23] In *Head of Department of Education v Mofokeng and others*[7] the LAC stated that –

> …. Flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result"

[24] The Second Respondent was wrong in not accepting Mr. Orton' argument with regard to the shift in the evidentiary burden. There was clearly not a proper plan in place. The Second Respondent failed to consider the consequences of this lack of planning on the business of the Respondent; especially at a time when there were problems with shrinkage. [8]

[25] The question is whether these two errors will be enough to make the entire award unreasonable and therefore reviewable. Dismissal is not a form of moral outrage and the Applicant had the right to expect that his Managers and this includes the Third Respondent will take proper care of its business. The Third Respondent although a Trainee Manager was experienced. He worked at the Applicant for a period of six years; he knew that there were problems with shrinkage; and despite this, he did nothing; he did not plan or ask for assistance from his Divisional Manager. Because of this lack of planning the Applicant, suffered losses. It was not unreasonable to act decisively.

[26] The dismissal of the Third Respondent was therefore fair and the order to reinstate the Third Respondent under these circumstances was unreasonable.

[27] The award under review is to be set aside.

Costs

[28] Costs should be considered against the requirements of the law and fairness.

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[7] (2015) 1 BLLR 50 (LAC) at para 32

[8] The commissioner did not consider the central dispute – see *Ntoagae and Another v Anglo Platinum LTD JA* 8 / 2012 (2014) ZALAC 47 (19 September 2014)

[29] The requirement of law has been interpreted to mean that the costs would follow the result.

[30] In view of social justice and the fact that the Third Respondent is unemployed. I am of the view that each party must pay its own costs.

[31] In the premises I make the following order:

Order

1. The Applicants application for review is upheld;

2. The arbitration award issued by the Second Respondent on 26 January 2016 under case number FSBF 4649-15 is reviewed and set aside.

3. The award is replaced with the following order;

   3.1. The dismissal of the Applicant was fair and he is not entitled to any relief

4. There is no order as to costs.

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Werner Kruger

Acting Judge of the Labour Court

Appearances:

For the Applicant	:	R J Orton
Instructed by	:	Snyman Attorneys
For the Third Respondent	:	Mr P R Cronje
Instructed by	:	Peyper Attorneys