IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 2910/08

In the matter between:

NATIONAL UNION OF MINEWORKERS	1st Applicant
FRANCE SITHOLE	2nd Respondent
LYMON NYAMA	3rd Respondent

And

COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	1st Respondent
TIMOTHY BOYCE N.O.	2nd Respondent
RICKLEENBLASTINGCONTRACTORS	3rdRespondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued under case number GAJB24150-08 dated 26th October 200, in terms of which the second respondent (the commissioner) found the dismissal of the second and third applicant to have been both substantively and procedurally fair.

Background facts

[2] The applicants are former employees of the third respondent who were dismissed for acts of dishonesty in that they had allegedly stolen drill steel belonging to the third respondent.

[3] The third respondent in the supplementary affidavit, states that on the 25th July 2008, at knock off time Andre Hin, after giving him his pay slip told him that he had been trying to reach him through the phone to no success. He looked at his phone and said he (the third respondent) could have deleted his missed call. Thereafter he was called by the company owner, Mr Jack Jordan who required seeing his phone. When Mr Jordan, checked the third applicant's phone he found Mr Piet Myburg' telephone number on his phone. According to him he had taken those numbers from one of the vehicles of Mr Myburg who was involved in the same business as that of the third respondent. He claims to have taken the phone numbers because he had intended to phone him for a job.

[4] The second and third applicants were then charged with the following acts of misconduct:

"Gross dishonesty in that he (they) ciphered and soled company diesel at Progress Road squatter camp on 22 May 2008 to a person called Jimmy."

Gross dishonesty in that he (they) sold company property (tool) to Mr Piet Myburg from a company called Ground ZERO at his premises, at Madeline Street on the 3 June at 17: 45."

[5] At the disciplinary hearing the applicants denied the acts of misconduct levelled against them. The second applicant who was the driver at the time denied driving to Mr Myburg companion on the day in question.

Grounds for review and the award

[6] The applicants in their challenge of the commissioner's award rely on several grounds of review. In essence the grounds are based on allegations of gross irregularity, misconduct and that the commissioner exceeded his powers. These grounds are largely based on the approach adopted by the commissioner in dealing with the evidence before him particularly that of the witnesses of the third respondent. In this respect, the applicants criticised the finding of the commissioner on the following grounds:

a. The applicants did not deny that the third respondent's eight (8) ton truck was at the premises of the Ground Zero.

b. Accepting the evidence that the reason why the truck was at Ground Zero was for the purposes of delivering the manifold and drill steel and the property belonging to the third respondent.

c. That the stolen property was delivered at the time when the third respondent was at ground zero.

[7] The applicant further contended that the arbitration award was reviewable because the commissioner ignored the evidence relating to the main reason why the third respondent took disciplinary step against the applicant. According to the applicants the disciplinary action was motivated by the fact that the applicants had joined the union.

[8] The commissioner was also criticised for finding that the applicants were untruthful witnesses. The applicants further contended that the commissioner failed to give reasons for his conclusion.

[9] The other criticism against the commissioner relates to his finding that it was in the interest of justice to accept the untested alleged version of Mr Coetzee and respondent's unidentified members of Ground Zero without verifying the authentication of such allegations.

[10] Another complain which the applicant levelled against the commissioner is that he misunderstood, misinterpreted and failed to apply his mind to the hearsay evidence of some of third respondent' witness.

[11] The commissioner in his analysis of the evidence found that the applicants did not deny that the employer's eight ton truck which is usually driven by the third applicant was at the premises of Ground Zero on the 3rd June 2008. In this respect the commissioner says that the applicants failed to provide an explanation for the damning evidence against them except for saying that Myburg and Jordan were unhappy about them joining a union.

The arbitration proceedings

[12] The first witness of the third respondent was its manger and owner who testified that during June 2008, he received information about the sale of a whole manifold and a quantity of drill steels to a certain Mr Myburg and managing director of Grand Zero Blasting. Jordan further testified that he was informed by Myburg that the process of selling to him the property of the third respondent by its employees had been going on for quit some time. After receiving this information the respondent sent one of his employees to Ground Zero to fetch the manifold but did not collect the drill steel as they looked the same. Thereafter the third respondent laid charges of theft against Myburg.

[13] Jordan testified further under cross examination that the manifold in question definitely the property of the third respondent and was responsible for the manufacturing of the drills.

[14] Second witness of the third respondent was Myburg who testified that the second and third applicants delivered drill steel and manifold at his premises at Ground Zero. He testified that he was not present when the delivery took place but was informed by his employees that people who delivered the drills and the steals were employees of the third respondent. He also confirmed that after reporting the matter to Jordan, the manifold was collected by one of the employees of the third respondent. He thereafter received a telephone call from the second responded who informed him that himself and the third applicant had been arrested for theft and that they

required an amount of R1600, 00 for bail. During that telephone conversation, Myburg informed the second applicant about the conversation he had with Jordan of the third respondent. He informed him that he had undertaken no longer to purchase stolen goods from the employees of the third respondent. Myburg also testified that the process of purchasing goods from the third respondent's employees had been going on for a period of approximately one year. Myburg testified during cross examination that he came to know that the goods which had been purchased from the applicants belonged to the third respondent after he was so informed by his father- in-law. He was also informed by the second applicant that the goods belonged to the third respondent.

[15] The second applicant was paid cash for the goods in question and the third applicant would be around whenever payment was effected.

[16] The case of the second and third applicants during the arbitration hearing was to deny ever delivering the property in question at Ground Zero during June 2008. The second applicant in his testimony denied ever taking the third respondent's property to Ground Zero on any other occasion and claimed that Myburg in what he said regarding the purchase of the goods in question was **"***Just trying to surprise us."* He also testified that he did not know Myburg and that he; Myburg had falsely implicated them purely because he wanted to support Jordan. He attributed the reason for their dismissal to the fact that they had joined a union. He conceded that both he

and the second applicant had been charged with theft related to diesel. He however, conceded also that Jordan statement to the police indicated the theft concerned the other property in question. He could not however, explain how the third respondent's manifold and steel were found at Ground Zero during June 2008.

[17] The third applicant in his testimony did not deny that the manifold in question belonged to the third respondent. He testified that he did not know Myburg and that he never sold to him any property belonging to the third respondent. He also alleged that the reason for their dismissal was because they had joined a union. When asked by the commissioner how the manifold belonging to the third respondent found itself at Ground Zero, the second applicant replied, *"It is possible Myburg got this from Jordan since they are friends"* and when asked further as to how he would have known that both were friends when he earlier had claimed that he did not know Myburg, he responded by saying, "*They must be friends."* When asked during cross examination as to why Myburg's cell phone number appeared on his cell phone address book, the second applicant testified that he had taken the number from Ground Zero's vans for the purposes of looking for work he also did not dispute under cross examination that he drives a white jetta which Myburg have claimed to have seen around Ground Zero particularly on those days when payment of the stolen goods was to be effected. He also

could not explain during cross examination why the truck that he usually drove was seen at Ground Zero on the day in question during June 2008.

Evaluation

[18] The test to apply in an application to review a decision of a commissioner has been set out in *Sidumo v Rustenburg Platinum Mines Ltd and others 2007 28 ILJ 2405 (CC)***,** as follows: "Is *the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair legal practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair." (at 2439).*

[19] In essence the complaint of the applicants regarding the decision of the commissioner is that their dismissal was unfair, because the manner in which the evidence was evaluated by the commissioner. It would appear that the main challenge to the commissioner's assessment of the evidence concerns the versions of the parties as supported by the probabilities.

[20] It is trite that in dismissal case the employer bares the onus of showing that the dismissal was fair. Thus the starting point for a commissioner in assessing the versions presented by the parties during the arbitration hearing is to determine the extant to which the employer's version is more probable than not. In *Early Bird Farms (Pty) Ltd v Mlambo [1997] 5 BLLR 541(LAC) at 544,* the court held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that

prove on a balance of probability was sufficient. In *Maruapula and other v Confteen (Pty) Ltd (1999) 20 ILJ 1837 (LAC),* the court in dealing with the approach to be adopted in dealing with the evaluation of evidence held that:

"*The credibility of witnesses and probability or improbability of what they say should not be regarded as separate enquiries to be considered piece meal. They are part of the single investigation into the acceptability of otherwise of the employers version, an investigation where questions of demeanour and impression are measured against the content of the witnesses evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities that at the end of the day one can say with conviction that one version is more probable and should be accepted, not that therefore the other version is false and may be rejected with safety"*.

[21] In *Mbhele and another v Strange Cleaning Services CC 2001 32 ILJ 246 (CCMA) at page 2751D-G***,** it was held that in dealing with the issue of assessment of probabilities that:

"The arbitrator needs to first look at the version of the employer and decide whether the version is probable. In other words, could such a thing really happen? If the arbitrator is satisfied that the version of the employer is probable, he must there after decide if the version of the employee is probable. If he similarly decides that the version of the employee could have

happened, the arbitrator must thereafter decide which version is more probable, by comparing the opposing versions."

[22] The answer to the complaint by the applicants regarding the acceptance of the hearsay evidence of Myburg about what he was told by his father- in-law, concerning the delivery of the property of the respondent can be found in the judgment of *Swiss South Africa (Pty)Ltd v Louw N O and others 2006 27 ILJ 1995 395,* where at page 403 paragraph 43 the court held that:

"Depending on the circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA."

[23] It is clear from the reading of the arbitration award that the commissioner applied his mind to the hearsay evidence that had been presented and in accepting such evidence relied on the provisions of section 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988 which reads as follows:

"(1) subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless:

(c) the court having regard to –

(i) the nature of the proceedings

(ii) the nature of the evidence

(iii) the purpose for which the evidence is tendered

(iv) the probative value of the evidence

(v) the reasons why the evidence is not given by the person upon whose credibility the probative value of such evidence depends

(vi) any prejudice to the party which the admission of such evidence might entail

(xi) any other factor which should in the opinion of the court be taken into account.

Is of the opinion that such evidence should be admitted in the interest of justice."

[24] As stated earlier it is clear that the commissioner did apply his mind to the issue of the hearsay evidence which had been presented and in this regard he recognised that he was vested with the discretion in the interest of justice whether or not to accept such hearsay evidence. In this respect the commissioner reasoned as follows:

"*Having regard to the factors numerated in section 3 (1) (c) of the LEAA, together with the objective facts regarding the presence of the employers it tan truck at the premises of Ground Zero and delivery of the delivery of the manifold to the premises of Ground Zero on the third June 2008, it is clear that the above mentioned hearsay evidence should be admitted "in the interest of justice"*.

[25] In my view the commissioner can not be faulted for unreasonableness in the manner in which he assessed the evidence before him including how he came to the conclusion that the third respondent had discharged its onus of

showing on the balance of probabilities that the applicants were guilty of theft of the third respondent's property. I have also indicated that the commissioner could not be faulted for the manner in which he approached the hearsay evidence presented by the third respondent.

[26] For the above reasons it is my view that the applicants application to have the second respondents arbitration award issued on the 26 October 2008 reviewed, stand to be dismissed. As concerning the issue of costs there is no evidence indicating that the relationship between the first applicant and the third respondent no longer exist and therefore it is not in my view be proper to allow costs to follow the results.

[27] In the premises the following order is made

1. The review application is dismissed
2. There is no order as to costs

Molahlehi J

Date of Hearing : 28th October 2009

Date of Judgment : 3rd February 2010

Appearances

For the Applicant : Mr Makinta of Makinta Attorneys

For the Respondent : Adv Prinsloo

Instructed by : Vogel Malan Attorneys