

SOUTH AFRICA / JUDGMENT

Almar Investments (PTY) Ltd v CCMA and Others (JR 109/2020) [2022] ZALCJHB 227 (16 August 2022) [2022] ZALCJHB 227

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR 109/2020

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE

NO: JR

109/2020

In

the matter between:

ALMAR INVESTMENTS

(PTY) LTD

Applicant

and

THE

CCMA

First Respondent

COMMISSIONER

JOSEPH NGOBENI

Second Respondent

AMCU

OBO SIMON MASINGA

Third Respondent

Heard:

11 August 2022

Delivered:

16 August 2022

Summary:

Review application – arbitration award falls within the bands of reasonableness. The duty to determine the fairness of a dismissal is a statutory duty of commissioners. A Labour Court judge is not there to outshine a commissioner with regard to that statutory duty. Even if the reviewing judge does not like the outcome, the veritable question remains: Is the decision one that a reasonable decision maker may not reach? Once the decision falls within the bands of reasonableness, the Labour Court is powerless. Held: (1) The application for review is dismissed. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] More often than not, a failing turbocharger will make a loud, distinctive noise. The answer in this dispute lies in whether a turbo made the distinctive noise or not. If it did, it must follow that it was faulty. If it did not the contrary is true. Before me is an application seeking to review and set aside an arbitration award

issued by Commissioner Joseph Ngobeni (Ngobeni) in terms of which he found that the dismissal of Mr Simon Masinga (Masinga) for reasons of misconduct (gross negligence) was substantively unfair.

[2] The application is duly opposed by AMCU on behalf of Masinga. The applicant, Almar Investments (Pty) Ltd (Almar) contends that the arbitration award is reviewable in law.

Background**facts**

[3] Masinga was employed by Almar as a diesel mechanic since September 2014. He was dismissed on 3 July 2019. The circumstances leading to his dismissal are briefly as follows. On 31 May 2019, at around 16h00, Mr Dirk Brouwer Naude (Naude), the workshop manager instructed Masinga to install a new turbo on a machine. On his version, he showed Masinga the new turbo to be fitted together with the parts he needed to fit the turbo with. He further instructed Masinga to start the engine and wait for the smoke to die down, which smoke would have been caused by the excess oil that went into the exhaust pipe. Thereafter, Masinga must take the machine to the wash bay.

- [4] Naude then knocked off shortly thereafter. The following day in the morning, he encountered an induction pipe next to one of the machine's left rear wheel. Realizing that the induction pipe was not fitted he ran to the parking bay, where he encountered the machine in question parked. The machine had been in use for the past three hours. He instructed one Bongani Mtshweni (Mtshweni) to bring the machine in question to the workshop for investigation and fitting of the induction pipe, he had encountered. On investigations, in the oil filter, there were metal particles. The induction pipe was fitted. Later on, the machine was returned to the workshop due to lack of power.
- [5] On Masinga's version, indeed on the day in question, he was instructed to fit the turbo. He and his assistants did that whereafter they ran the engine until the smoke died down. After that, he took the machine to the washing bay. He and his assistants cleared the working area and collected all their tools. Later on, he overheard Naude alleging that he did not fit the induction pipe but he did not show him the said pipe.
- [6] Shortly after, Masinga was charged with gross negligence. After a disciplinary hearing, he was found guilty and dismissed. Aggrieved by his dismissal, he referred a dispute to the CCMA and alleged unfair dismissal.

Grounds of review

- [7] Almar contends that Ngobeni misconstrued the relevant questions of law and fact by taking into account evidence that was not placed before him and by failing to apply his mind to the evidence. The deponent of the founding and supplementary affidavit in a nitpicking fashion dissected the body of the arbitration award and made conclusions that Ngobeni had erred. Additionally Almar challenged the relief of reinstatement.

Evaluation

- [8] The statutory duty to determine the fairness of a dismissal lies with commissioners in an instance where a dismissal is predicated on allegations of misconduct. It is not the duty of a judge on review to do that. A review application does not present a judge with a rare and golden opportunity to outshine, as it were, commissioners with regard to their statutory duties.
- [9] Mr Beaton SC, who appeared on behalf of Almar rightfully so conceded that Ngobeni was faced with two conflicting versions with regard to the installation or non-installation of the induction pipe. The version of Naude is that when he came in in the morning he encountered an induction pipe and concluded that there was a problem. The version of Masinga is that he carried out the instruction and tested the turbo. Almost twenty years ago, Nienaber JA in Stellenbosch Farmers' Wine Group Ltd and Another v Martell Et Cie and Others[1] suggested a technique to be employed when one is faced with two irreconcilable versions. It was suggested that a Court must make

findings on (a) the credibility of various factual witnesses; (b) their reliability; and (c) the probabilities.

- [10] In order for Almar to have discharged its statutory onus, it had to show that indeed Masinga did not fit the induction pipe. The way Naude encountered the pipe and its status (newness or oldness) left Ngobeni in doubt. Naude as he should have did not take a picture of the pipe. Most importantly, he did not summon Masinga to show him where the pipe was lying when he encountered it. The first thing he did was to spell trouble and thereafter called Mtshweni and worked with him to fit what Mtshweni referred to as an old induction pipe. Ngobeni made credibility findings, he assessed the reliability of the witnesses and most importantly, he weighed the probabilities. There was no dispute that the machine operated for about three hours. There was also no dispute that when not fitted with an induction pipe, a turbo makes an unusual sound.
- [11] Regard being had to approved review test, it is not for this Court to say, Ngobeni should have weighed the probabilities this way or the other. There is clear evidence that Ngobeni made credibility findings; assessed the reliability of the witnesses and weighed the preponderance of probabilities. Having done that the outcome he emerged with fell within the bands of reasonableness. The contention that Ngobeni misconstrued the questions of law and facts by taking into account evidence not placed before him and by failing to apply his mind is without merit. The outcome he reached is justified by the evidence that was placed before him.
- [12] It is improbable that Masinga as a mechanic of five years can decide not to install an induction pipe, knowing fully well that the turbo would malfunction. The fact that the machine had ran for about 45 minutes in order to burn excess oil and that the operator operated it for three hours without any difficulties lends credence to the contention that the induction pipe was fitted. Therefore, on the preponderance of probabilities, a reasonable decision maker may make a finding that Masinga is not guilty of gross negligence.

Conclusions

- [13] For reasons set out above, this Court arrives at a conclusion that the arbitration award issued by Ngobeni is unassailable. It does fall within the bounds of reasonableness and is capable of justification when regard is had to the evidence and the material properly placed before him. Accordingly, Almar is bound to fail in its quest.

- [14] In the result the following order is made:

Order

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

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr R G Beaton SC

Instructed by:

Jansen Van Vuuren Attorneys, Randburg.

For the Respondent: Mr A Cook

Instructed by: LDA Inc Attorneys, Hyde Park.

[1] 2003 (1) SA 11 (SCA) at para 5

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