

SOUTH AFRICA / JUDGMENT

Chrome Traders (Pty) Ltd v Commissioner Verhoef N.O. and Others (JR541/18) [2022] ZALCJHB 118 (12 May 2022)

[2022] ZALCJHB 118

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR541/18

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

no: JR

541/18

In

the matter between:

CHROME TRADERS (PTY)

LTD

Applicant

and

COMMISSIONER

J F VERHOEF N.O.

First Respondent

THE

CCMA

Second Respondent

AMCU

OBO MKONDO ADRIAN

Third Respondent

Heard:

10 May 2022

Delivered:

12 May 2022

Summary: An opposed review application – award falls outside the bands of reasonableness. Held: (1) The arbitration award is reviewed and set aside. (2) The dispute is remitted back to the Commission for Conciliation, Mediation and Arbitration for arbitration de novo. (3) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Section 138

(1) (a) of the Labour Relations Act^[1] (LRA) requires commissioners to conduct arbitrations in the manner they consider to be appropriate, however they must deal with the substantial merits of the dispute with the minimum of legal formalities. These imperatives imply that commissioners must refrain

from coining legal terminologies that they either do not mean or do not understand. They must steer away from confusing the parties

appearing before them. Where they employ phrases with a particular legal connotation, they are duty bound to explain those phrases to lay litigants who appear before them. In this dispute, a party, Chrome Traders (Pty) Ltd (Chrome) sought to present video footage as evidence in order to discharge its onus in terms of section 192 of the LRA. Commissioner J F Verhoef (Verhoef) chose to label the video footage contained in two compact

discs (CDs) as exhibits 1 and 2 respectively. Having done that, he did not explain to the lay parties before him what that labelling

means in law.

[2] That said, this is an opposed review application in terms of which, Chrome seeks an order reviewing and setting aside an arbitration award issued by Verhoef. Verhoef found that the dismissal of Mr Adrian Mkondo (Mkondo) is substantively unfair. Verhoef ordered Chrome to reinstate Mkondo and pay to him arrear wages. Chrome was aggrieved thereby, hence the present application.

Background facts

[3] Mkondo was employed by Chrome as a supervisor since December 2005. Chrome operates as a chrome recover on the premises of Northern Platinum Mine (Northern). On 8 September 2017, the CCTV cameras captured Mkondo removing property from an area on the premises of Northern, at which area, he was not authorised to enter.

- [4] Consequently, on 2 October 2017, Mkondo was charged with an allegation labelled as “unauthorized possession of property belonging to the client”. At a subsequent disciplinary hearing held on 18 October 2017, Mkondo was found guilty as charged and dismissed. Aggrieved by his dismissal, Mkondo with the assistance of his trade union referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged an unfair dismissal. Conciliation failed to resolve the dispute. Mkondo again assisted by his trade union, AMCU, requested that the dispute be resolved through arbitration. It is important at this juncture to refer to the referral forms, wherein the referring party outlined the dispute. The LRA form 7.11 recorded the following:

“4. SUMMARISE THE FACTS OF THE DISPUTE

Company claim that the employee was found in position (sic) of unauthorized position (sic) of property.

7. FAIRNESS/UNFAIRNESS OF DISMISSAL

- (a) Procedural issues...
- (b) Substantive issues

Company failed to provide the property that they claim was in position (sic) of the employee.”

- [5] The LRA form 7.13 requesting arbitration recorded the following:

“The issues in dispute are: “applicant dismissed for alleged being in position (sic) of clients (sic) property”.

3 WHAT DECISION WOULD YOU LIKE THE COMMISSIONER TO MAKE:

“Reinstatement

Ruling.

During the hearing employer failed to present the property that was found in position (sic) of the applicant and to prove that it was indeed the applicant who appears on the footage.”

- [6] Suffice to mention at this stage that the case outlined above was the case Chrome was required to meet at arbitration. As indicated above Verhoef was appointed to resolve the dispute through arbitration and he on 11 February 2018 issued the impugned arbitration award.

Grounds of Review

- [7] Chrome in its founding papers regurgitated what transpired at the arbitration proceedings. However, its gripe is that Verhoef refused to afford it a postponement in order to deal with the authenticity of the video footage challenge, which was only sprung on it during arbitration, in the circumstances where there was no demonstrable prejudice to be suffered by Mkondo.
- [8] Additionally, Chrome laments gross irregularity because Verhoef failed to watch the footage (in other words to consider and assess the evidence placed before him). Had he done so, he would have reached a conclusion that the version of Mkondo is false in that he can be identified in the video footage. A refusal of a postponement to enable it to present evidence to prove the fairness of the dismissal amounted to a reviewable irregularity. Retrospective reinstatement of Mkondo was not a reasonable outcome.

Evaluation

- [9] Section 192 of the LRA places an onus on the employer to prove that a dismissal is fair. Where an employer is prevented from proving the fairness of a dismissal, an

irregularity is bound to arise. An employer acquires a right to justify a dismissal once so challenged. Section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution) guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair manner. In addition section 138 (1) (a) of the LRA guarantees any party at the arbitration hearing a fair determination of a dispute.

- [10] That said, the case outlined by Mkondo was one that suggests that at the disciplinary hearing Chrome failed to exhibit the property he allegedly stole. There was no indication prior to the arbitration proceedings that Mkondo challenged the authenticity of the video footage. All he was concerned about is that the image of a person to have been shown in the video footage is not him. In order to rebut this challenge, Chrome needed to playback the footage and demonstrate in whatever means that the image of a person

depicted is Mkondo. In the event that Verhoef is not satisfied with the probative value of the testimony, then a conclusion could have been reached that Chrome failed to discharge its onus of proof. However, Verhoef was not entitled, as it shall be demonstrated below, to prevent the use of the evidence.

The video footage testimony.

- [11] Central to this dispute is the usage of video footage in the arbitration proceedings. In its written opening address, Chrome stated the following:

“2.4 The applicant (Mkondo) was found guilty based on proof “beyond all reasonable doubt” as CCTV footage was presented. (To be presented & viewed during the Arbitration Proceedings)”

[12] It is beyond being perspicuous from the above statement that in order to prove the guilt of Mkondo, Chrome intended to present the footage for viewing. It is apparent that Mkondo and his representative expected the footage to be viewed as part of the evidence in the arbitration proceedings. One Mr Spencer Tikoane (Tikoane), an AMCU official, represented Mkondo at arbitration. The transcript reveals the following:

“COMMISSIONER: Thank you, are there any preliminary issues that needs to be addressed, the preliminary issue with regard to this conviction (sic) of the CCMA or representation or so forth from the applicant side, any preliminary issues?”

MR TIKOANE: Yes commissioner, preliminary issues are just the issue of that I see the company will present the video footage, maybe I am wondering if there will be someone to interpret it actually...

[Intervenens]

COMMISSIONER: Alright, but we will deal with that, that is with regard to the preliminary issues with regard to the evidential value of the video footage if I understand you correctly?

MR TIKOANE: Yes”

[13] It is clear that Verhoef did not actually understand Tikoane. What Tikoane was enquiring about was who shall be interpreting the footage as and when it is being viewed and presented as evidence. Normally CCTV footages show images without voices. So more often than not, someone would explain and or interpret the images as and when the footage is played back. It is unclear as to what Verhoef was referring to by “evidential value”. Undoubtedly, Tikoane may not have understood what evidential value is. Nevertheless, he had no objection to the presentation – in a form of viewing – of the footage.

[14] Mr Kuhn (Kuhn) represented Chrome at arbitration. When asked to make an opening statement, he dished out a bundle that contained the written opening statement referred to earlier. However, he unequivocally stated the following:

“MR KUHN: Evidence from security of videos, we have seen on the video’s that Mr Adrian was involved of the PGM and appearing stated on the footages, he is positively identified and he is the person.”

COMMISSIONER: He is identified by way of video footages?

MR KUHN: That is correct ...”

[15] Based on the above, it became clear that the footage was a critical piece of evidence that Chrome wished to use to positively identify Mkondo in order to prove his guilt. The transcript does reveal that Verhoef asked to be given a CD to enable him to view the footage on his laptop. He also stated that the footage would have to be viewed by all. After being placed in possession of the CDs, he chose to give them exhibit numbers. After giving, the CDs exhibit numbers he enquired whether there was any dispute about the footage. The first answer given by Tikoane was confusing. However, clarity was sought and the following

emerged to be the basis of the objection:

“COMMISSIONER: Is the applicant on the video footage or not?”

MR TIKOANE: Not

COMMISSIONER: Not, so you dispute that it is the applicant on the video footage?

MR TIKOANE: Yes, Commissioner.”

[16] It is clear from the above exchange that the dispute was regarding the contents of the footage and not the authenticity of the footage. Put it differently, where the footage shows an image of a person, the case of Chrome will be that the person is Mkondo whilst his evidence will be that that is not his image. This dispute could have easily been resolved by Verhoef allowing the viewing of the footage and for each party to affirm and or dispute whatever images are being shown.

[17] The term exhibit is employed mainly in proceedings. Arbitrations take a form of civil proceedings. In civil proceedings, an exhibit is documentary

evidence, in a form of video recording, which forms part of the testimony to be reviewed by the decision maker. Merriam Webster’s

Dictionary defines exhibit to mean a document or material object produced and identified in court or before an examiner for use as evidence. It must follow that when Verhoef labelled the CDs as exhibits, as a trained commissioner knew or ought to have known that anything taken as an exhibit is taken for evidentiary purposes. Verhoef did not take time to explain to any of the parties, in particular Chrome, the legal import of labelling the CDs as exhibits. He was duty bound to explain that to the parties as lay litigants.

[18] Despite having recorded the CDs as evidence serving before him, he prevented Chrome from leading further evidence in support of that piece of evidence simply because the witness to be led on the contents of the footage was not the one who extracted the footage. That was inappropriate. The issue before him around the footage was not that there was phony footage but whether the images to be viewed therein will show an image that fits Mkondo’s person. He should have allowed the viewing of the images and await

the testimony to be presented by Mr De Kock (Kock) on the identification of the images contained therein. If Kock had encountered Mkondo as a person before the incident, it probably would not have been difficult for him to state that the image of a person shown on the footage is that of Mkondo. Mkondo would have been in a position to challenge that testimony in any manner whatsoever.

[19] Generally, video evidence is considered real evidence. It is evidence that a decision maker may examine by himself or herself. Video footages are also governed by the provisions of Electronic Communications and Transactions Act[2] (ECTA). When it comes to its admissibility, the provisions of section 15 must be taken into account. The section reads thus:

“15(1) in any legal proceedings[3], the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence –

- (a) On mere grounds that it is constituted by data message; or
- (b) If it is, the best evidence that the person adducing it could reasonably be expected to obtain, on the ground that it is not in its original form.
- (2) Information in the form of a data message must be given due evidential weight.
- (3) In assessing the evidential weight of a data message, regard must be had to –
 - (a) The reliability of the manner in which the data message was generated, stored or communicated;
 - (b) The reliability of the manner in which the integrity of the data message was maintained;
 - (c) The manner in which its originator was identified;
 - (d) Any other relevant factor.”

[20] It has been accepted that although ECTA does not include video footage in the definition of a data message a purposive interpretation

includes video footages[4]. A proper reading of section 15 of ECTA reveals that the issue regarding authenticity only arises when assessing the evidential weight of a video footage. Therefore, the approach taken by Verhoef to prevent the leading of evidence on the video footage on the ground that it has not been authenticated first is inconsistent with the provisions of section 15. Owing to the fact that section 138 (1) of the LRA discourages too much legal formalities, it cannot be so that the original video footage was required. Nevertheless, section 14 of ECTA provides that where a law requires information to be presented or retained in its original form, that requirements will be met by a data message if (a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and (b) that information is capable of being displayed or produced to the person whom it is to be presented. In any event, it does not appear to be Mkondo’s case that the footage was tampered with in any manner or shape. His case is simply that the person imaged therein is not him.

- [21] In the final analysis, this Court agrees with a contention that Verhoef ought to have viewed the footage to enable him to assess its evidentiary weight. Having failed to do so, Verhoef committed an irregularity that vitiates his arbitration award. On this basis alone, the arbitration award issued by Verhoef does not pass the constitutional muster of reasonableness.

The postponement

ruling

- [22] In view of the conclusion reached above, it is unnecessary to dwell much on the postponement refusal challenge. It is true, as submitted by Mr Cook for Mkondo, that in refusing a postponement, Verhoef exercised a true discretion, which is interferable on a very narrow basis. However, Verhoef and not Mkondo effectively raised regard being had to the facts of this matter, the issue of authenticity. Having done so, the interests of justice demanded that the applicant be afforded an opportunity to authenticate the footage.
- [23] This does not involve a situation where Chrome rocked up at the arbitration proceedings and sought a postponement of the arbitration due to being unready or something of that sort. It was forced into the request by the conduct of Verhoef, which in any event is inconsistent with the legal position outlined in the ECTA. In the circumstances, the exercise of the discretion was not judicious and it was based on wrong principles of the law.

Conclusions

- [24] For all the above reasons, the arbitration award issued by Verhoef is not one that a reasonable decision maker would reach. A reasonable

decision maker would not have prevented Chrome to lead any form of evidence on the footage already labelled an exhibit. A reasonable

decision maker would have, if concerned with the originality of the footage first assessed the footage in line with section 14 of the ECTA. If still not satisfied, to afford Chrome an opportunity to authenticate its evidence to discharge its statutory onus set out in section 192 of the LRA. Subsection 14 (2) of ECTA provides that the integrity must be assessed by (a) considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display; (b) in the light of the purpose for which the information was generated; and (c) having regard to all other relevant circumstances.

- [25] In the circumstances of this dispute, Chrome was not afforded an opportunity to prove the fairness of the dismissal. Thus, denied a fair hearing which denial amounts to gross irregularity. In line with section 34 of the Constitution, read with section 192 of the LRA, Chrome deserves that opportunity. Accordingly, a remittal order is warranted in this instance.

[26] In the results, the following order is made:

Order

1. The arbitration award issued by Commissioner J F Verhoef under case number LP7903-17 dated 11 February 2018 is hereby reviewed and set aside.
2. The dispute is remitted back to the CCMA for arbitration de novo by another commissioner other than Verhoef.
3. There is no order as to costs.

G. N. Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: L Taylor of J R Inc Pretoria.

For the Respondent: Mr A Cook

Instructed by:

LDA Inc, Hydepark

[1] No. 66 of 1995, as amended.

[2] No. 25 of 2002, as amended.

[3] These includes arbitration proceedings.

[4] See: S v Brown (CC 54/2014) [2015] ZAWCHC 128 (17 August 2015).

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