

SOUTH AFRICA / JUDGMENT

EOH Abantu (Pty) Ltd t/a Highveld PFS (Pty) Ltd v CCMA and Others (JR2814/12) [2015] ZALCJHB 310 (19 August 2015) [2015] ZALCJHB 310

COURT

Labour Court Johannesburg

BEFORE

Whitcher

CASE / FILE NUMBER

JR2814/12

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REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2814/12

In the matter between:

EOH ABANTU (PTY) LTD T/A HIGHVELD PFS (PTY) LTD

APPLICANT

and

CCMA

FIRST RESPONDENT

NELSON LEDWABA

SECOND RESPONDENT

ABRAM JACOB KNOX

THIRD RESPONDENT

Heard: 29 JANUARY 2015

Delivered: 19 August 2015

Whitcher J

Introduction

[1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as ‘the commissioner’. In his award, the commissioner held that the dismissal of Mr. Knox by the applicant was substantively unfair. The commissioner awarded compensation to Knox in an amount of R270 000.00. This amount is equivalent to six months’ compensation.

[2] Knox was employed by the applicant, a labour broker, in September 2009 to render services as a mine manager to the applicant’s

client, Gravmax at its Letshaba Crushers site (“the mine”). He was also responsible for approving and verifying timesheets for all workers at the mine.

[3] In January 2011, Shane Boswell was contracted to do blasting and drilling for Gravmax at the mine. He worked with a team of workers. In February, Boswell, trading as Rock Breaking Technologies, also accepted a contract to do blasting and drilling for another company, Dewcon, at its Dan Village site. He used the services of some of the workers he used at the Letshaba site. The Dewcon project consisted of two phases. The first phase was from February to March 2011. The second phase ran from May to July 2011.

[4] Knox was charged with “gross negligence in the execution of your duties as mine manager of Letshaba Crushers in that you were involved and/or participated in unauthorised drilling and blasting at Dan Village during April to July 2011, unauthorised use of Gravmax’s property and labour to perform such operations and acting in conflict of interest in participating in such operation for your own personal gain”. He was found guilty and dismissed on 17 October 2011.

[5] The applicant called two witnesses during the arbitration proceedings, Mr Danie Louw and Mr David Roux. Knox called Boswell as a supporting witness.

[6] The commissioner accepted the version of Knox and Boswell and in essence made the findings set out below.

[7] Mr Johan Van Niekerk, a director of Letshaba Crushers, gave permission to Boswell to continue with the Dewcon contract, particularly because there was uncertainty regarding the duration of the Gravmax contract. There were talks about Gravmax moving to Rustenburg.

[8] In any event, as an independent contractor, Boswell was free to accept other contracts. Documentary evidence confirmed that Boswell and his team of workers were not employees of Gravmax, Letshaba or the applicant. They were not entitled to any form of payment when they did not physically work at the mine, including days when the mine was closed for a period of time and not subject to statutory deductions, such as UIF and PAYE. Boswell

further used his own equipment to execute his duties at Letshaba Crushers, excluding compressors and rock drilling equipment.

- [9] Knox did assist Boswell with the Dewcon project, but only during the first phase. Armand Pienaar was contracted by Boswell during the second phase to assist him. Knox's assistance was of an administrative nature for which he did not receive any financial

benefit. Boswell was however supposed to pay Knox's bank charges.

- [10] Knox's assistance entailed receiving money into his personal bank account on behalf of Boswell, electronic payments to Boswell's creditors, the drafting of invoices and requesting quotes from Maxam Dantex, a company that supplies explosives, processing payments to creditors and others, including workers who had assisted Boswell.
- [11] He assisted Boswell because Boswell did not have access to a computer and internet and was computer illiterate. He had similarly assisted Gravmax with payments. It was the practice of Knox to make payments from his own banking account to an explosive provider, Maxam Dantex on behalf of Gravmax because he and the explosive company shared the same bank and the transfer of money was immediate and goods were delivered on proof of payment. Gravmax would later reimburse Knox for the payments made.
- [12] The applicant's witness agreed that what Knox did for Boswell would not have taken up substantial time and the applicant had no published rule or zero tolerance policy regarding the use of its computers and internet for private use.
- [13] Knox had no permission from the applicant or its client to assist Boswell.
- [14] With regards to the alleged use of Gravmax's labour, Boswell and his team were not employees of Gravmax. Further, the applicant failed to prove that Knox had approved time sheets, and thus payment from Gravmax, for Boswell and his workers when they were instead working on the Dewcon contract.
- [15] Boswell had used a compressor used by Gravmax on Dewcon project but had hired it from the suppliers during the three week period when the mine at Letshaba was closed. Boswell did once use a vehicle of Gravmax to attend Dewcon, but when he found out he reprimanded

Boswell for doing so.

- [16] Knox did send an invoice of R485.57 for explosives intended for payment by Rock Breaking Technologies to Gravmax for payment. Gravmax paid the invoice and only discovered the true position when Louw had queried the payment with the explosives company. He sent the invoice to Gravmax in error, the only error made while doing similar administrative tasks for both Gravmax and Boswell.

[17] Knox's position at Gravmax was advertised on the internet on 30 May 2011, approximately 5 months prior to the disciplinary hearing and his dismissal which inferred the applicant and its client sought to rid themselves of his services long before his dismissal.

[18] The commissioner found that the applicant had failed to prove the charges proffered against Knox and that, if Knox had committed

misconduct, it was his minimal use of Gravmax's computer and time to assist Boswell with administrative matters.

[19] The commissioner reasoned that the nature of this misconduct did not warrant dismissal having regard to the fact that there was no prove that it was to the detriment of Gravmax and Knox's advanced age at the time of the dismissal.

Grounds of review

[20] The applicant contended that the commissioner "misdirected himself" in various ways and did not make a reasonable

decision.

[21] The commissioner did not admit hearsay evidence from the applicant's witness, Louw, that Van Niekerk told him that he had not authorised the Dewcon project. The applicant contended that that this was a material misdirection because the applicant had a good reason for not bringing Van Niekerk as a witness: he was in jail at the time of the arbitration, and if the commissioner had accepted such evidence it would follow that the rest of Knox and Boswell's testimony was untruthful.

[22] There are a number of problems with this contention. There is nothing in section 138 of the LRA which obliges a commissioner to admit hearsay evidence merely on the basis that a witness is unavailable and in the context of a review it is not sufficient to merely rely on this ground to claim a reviewable irregularity.

[23] In any event, for hearsay evidence to be admitted and given weight, particularly hearsay evidence of a subjective nature as in this case, it must be shown to be reliable. The applicant has not averred or established such.

[24] Even if the commissioner had admitted the evidence and given it weight, there is no rule that the mere fact that a witness is found to be untruthful in one respect means that the witness's evidence as a whole automatically stands to be rejected. Concluding which version is more or less probable depends on the totality of the evidence and this conclusion must account for all of it.

[25] The case did not turn on this issue. The applicant still had an opportunity to address the fairness of his dismissal by establishing

the other allegations against Knox, which the commissioner found it did not. Further, the commissioner was alive to the fact that Knox did not have permission to assist Boswell, even if Boswell was entitled to take on other contracts.

- [26] The commissioner should have found that Knox was supposed to call Van Niekerk as a witness since it was his claim and defence that Van Niekerk sanctioned the Dewcon contract. This complaint is also dismissed. There is no rule that a version may only be accepted if it is corroborated. In any event, the case against Knox did not turn on this issue. It was common cause that he did not have permission to assist Boswell, even if Boswell was entitled to take on other contracts. The commissioner was alive to this fact.
- [27] The commissioner also refused to admit a written statement by Pienaar in the place of the applicant calling him as a witness. There is no merit in this ground of review. No reason was submitted at the arbitration for the applicant's failure to call Pienaar as a witness and the applicant has failed to why the commissioner's conduct amounts to a reviewable error.
- [28] The commissioner did not take cognizance of the contradiction in the versions of Knox and Boswell regarding whether Boswell had in fact paid Knox's ban charges. This is a distortion of the award. The commissioner specifically dealt with this issue and found the contradiction was not material. He further held that, either way, the payment would not have constituted personal benefit on the part of Knox.
- [29] The commissioner ignored Knox's admission that he made payments to workers on behalf of Rock Breaking Technologies. The commissioner dealt with this issue when he found that Knox had indeed assisted Boswell in his business.
- [30] The commissioner never made a finding as to whether Knox was correctly convicted on the charges. The various stated conclusions in the award clearly indicates that the commissioner did so, even if he did not spell it out.
- [31] The commissioner ignored documents submitted by the applicant. This is another distortion of the award. In the award, the commissioner
- regularly refers to the bundles of documents in his award, wherefore it is clear that he considered the evidence as pertained in the bundles.
- [32] The commissioner did not make a reasonable decision. In my view, the applicant failed in its review application to demonstrate that the arbitrator made material errors of fact or law which impacted on the outcome.
- [33] It is evident from the award that the arbitrator considered and applied his mind to the evidence presented, he gave reasons for accepting and rejecting certain evidence and he further gave reason as to why he did not consider dismissal to be appropriate even if Knox was guilty of unauthorised assistance of Boswell.

[34] There is no real demonstration, with reference to the record, that the conclusion reached by the arbitrator was a conclusion a reasonable decision maker could not reach considering the following material that was before him.

Order

[35] The application is dismissed, with costs.

WHITCHER J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants:

Van der Merwe Attorneys

For the Third Respondent: Thomas & Swanepoel

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