

SOUTH AFRICA / JUDGMENT

Foskor Limited v Commission for Conciliation, Mediation and Arbitration and Others (JR 1003/2011) [2022] ZALCJHB 28 (17 February 2022) [2022] ZALCJHB 28

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR 1003/2011

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE

NO: JR

1003/2011

In the

matter between:

FOSKOR
LIMITED
Applicant
and
THE
CCMA
First Respondent
DONALD
NKADIMENG
Second Respondent
NATIONAL
UNION OF MINEWORKERS (NUM)
Third Respondent
THABO
RAMATSA
Fourth Respondent

Heard:

17 February 2022 (On paper).

Delivered: 17 February 2022
Summary: Opposed review – award falls within the bounds of reasonableness.

Held: (1) The review application is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This application was enrolled for oral argument on 17 February 2022. Parties reached an agreement that the application should be determined without the hearing oral argument. It is an opposed review application, in terms of which, the applicant, Foskor Limited (Foskor) seeks to review and set aside an arbitration award issued by Commissioner Donald Kgalake Nkadimeng (Nkadimeng). Nkadimeng found that the dismissal of Mr Thabo Ramatsa (Ramatsa) was not for a fair reason. He ordered Foskor to reinstate Ramatsa on or before 1 April 2011 and to pay him back pay for the months of June 2010 up to and including April 2011.
- [2] Foskor was chagrined by the arbitration award and launched the present application on or about 6 May 2011. Ramatsa and the National Union of Mineworkers (NUM) oppose the present application. It is surprising to note that all the relevant papers in this review were filed September 2012, yet this matter came for determination almost ten years later. It is unclear as to what occasioned the delay in this matter. Nevertheless, the application is before Court for

determination.

Background facts

- [3] Ramatsa was employed by Foskor as a Superintendent: Load and Haul. During December 2009, the newly appointed Loss Control Officer (LCO) discovered that investigations of numerous incidents were not completed. He discovered that where investigations were completed, reports were not completed and in instances where recommendations were made, such were not implemented. The LOC brought his discoveries to the attention of Ramatsa. Owing to the fact that Ramatsa was not attending to the issues, the LOC escalated the matters to the Senior Manager: Mining. Resultantly, Ramatsa was charged internally. He faced allegations couched in the following terms; (a) failure to complete a full investigation report on an incident that took place in November 2009; (b) failure to initiate disciplinary action against an employee for an incident that took place on 26 November 2009; (c) failure to initiate a disciplinary action for an incident that took place on 2 November 2009; (d) failure to compile and complete a management report regarding an incident of 8 January

2010; and (e) failure to initiate discipline for the incident of December 2009.

- [4] Ramatsa was found guilty internally and dismissed. As outlined above, he was aggrieved and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair dismissal.

Grounds of review

- [5] Foskor contends that the arbitration award falls outside the bounds of reasonableness purely because, in its view, Ramatsa was guilty as charged. In supplementing its grounds, Foskor contended that Nkadameng ignored material facts and thereby failed to render fair arbitration proceedings.

Evaluation

- [6] Where an employee is dismissed for reasons related to conduct, an employer if challenged to prove the fairness of that dismissal, is obliged to (a) prove on the balance of probabilities that the dismissed employee was guilty of the misconduct that led to his or her dismissal; and (b) prove that dismissal, as a sanction was appropriate and fair.
- [7] The duty to determine the fairness or otherwise of a dismissal statutorily lies with an arbitrator. Having heard the evidence, Nkadameng reached a conclusion that Foskor has failed to prove that Ramatsa committed the alleged acts of misconduct and consequently failed to discharge the onus placed on it by section 192 (2) of the LRA. The Labour Court is not possessed with appeal powers against the arbitration awards issued in terms of the LRA. It only possesses review powers.
- [8] The grounds raised by Foskor are nothing but appeal grounds. Nkadameng considered the issue of the guilt or otherwise of Ramatsa. Applying his own sense of fairness as statutorily empowered to do so,

he reached a conclusion that Ramatsa is not guilty of the allegations that were presented by Foskor. When this Court considers the allegations and the evidence tendered before Nkadameng, this Court is unable to reach a conclusion that no other reasonable commissioner may reach the conclusions reached by Nkadameng.

- [9] When a decision maker is faced with conflicting versions, the only escape route is to weigh the probabilities. Ramatsa's version was that unknown persons wrote the recommendations after the documents left his office and such recommendations were never brought to his attention. Nkadameng accepted that version as being probable

as opposed to what he termed 'wild accusations' made by Foskor. This Court cannot fault the approach taken by Nkadameng in this regard. Acceptance of a version that Ramatsa did not generate the reports in question, leads to a reasonable decision that the alleged failures did not happen. This finding falls within the bands of reasonableness.

Conclusion

[10] In summary, the award issued by Nkadimeng falls within the bands of reasonableness. Nkadimeng did not ignore relevant material and certainly did not subject Foskor to unfair arbitration proceedings.

[11] 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:

None

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