

SOUTH AFRICA / JUDGMENT

Gumede v Albany Bakery and Others (J533/22) [2024]

ZALCJHB 338 (21 August 2024)

[2024] ZALCJHB 338

COURT

Labour Court Johannesburg

BEFORE

Molotsi

CASE / FILE NUMBER

J533/22

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: J533/2022

In

the matter between:

VICTOR
GUMEDE
Applicant
and
ALBANY
BAKERY
First
Respondent
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION
Second
Respondent
BUSISIWE
SEOKETSA
Third
Respondent

Heard:

30 April 2024

Delivered:21 August 2024

JUDGMENT

MOLOTSI AJ

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act^[1] (LRA). The third respondent (commissioner) issued the arbitration award on 1 February 2022. The commissioner upheld the dismissal of the applicant and dismissed his referral to the second respondent (CCMA).
- [2] The applicant received the arbitration award on 1 February 2022 and launched the review application on 14 March 2022.

The relevant facts

- [3] The applicant was employed by the first respondent (employer) as a driver salesman on 9 April 2017. The applicant was charged as follows:

‘Gross Negligence (verbatim)

In that you failed to follow the cash handling procedure on 19 February 2020 and also on the 25 February 2020, you failed to put your daily collection into the safe and you were robbed of an amount of R7 320 on the 1st robbery and 2nd robbed an amount of R2 500.’

- [4] The applicant’s disciplinary hearing was held on 25 March 2020, and he was dismissed on 29 April 2020. He referred an unfair dismissal dispute to the CCMA on 9 June 2020 and applied for condonation. Condonation was granted on 10 September
2021. The arbitration proceedings took place on 21 January 2022. The applicant testified during the arbitration proceedings. The employer called three witnesses to testify during the arbitration.
- [5] The applicant’s case was that he was robbed twice. The first robbery took place on 19 February 2020 whilst he was making a delivery at Buffer Zone, Mamelodi. He alleged that he had parked outside the tuckshop and was busy making recordings of cash payments in his book when two people approached him from both sides of the truck and one person was holding a gun.
- [6] They demanded money. One person got inside the truck and searched it. Money was found in his pockets and another amount of money was found underneath the driver’s chair. The robbers took an amount of R7 320. The safe in the truck was not functioning properly and he could not drop the daily takings into the safe.

- [7] The second robbery happened on 25 February 2020, and he was making deliveries in Nellmaphus. He returned to the truck after taking an order from the client and the client had paid him cash for the deliveries. On this day, the safe was working. He was then robbed.
- [8] The employer's case at arbitration was that on 24 February 2020, the applicant reported that his safe was not working. The applicant's safe was then fixed on the same date (24 February 2020) and two days later, the applicant reported a robbery. At the time when the robbery took place, the safe was fixed. The applicant informed the assistant bakery manager that the reason why he had cash in his possession was that the safe was not working.
- [9] The video footage installed in the truck revealed that the applicant tended to put money in his pockets and not adhering to cash-handling procedures. In respect of the robbery of 19 February 2020, the employer stated that the applicant failed to report the defect in the safe in the defect vehicle checklist as per the procedure at the workplace and money was found in his possession.

Grounds for review

[10] The applicant's pleaded grounds for review are the following:

- 10.1. The result which the third respondent reached in the arbitration award is unreasonable and is not one that a reasonable arbitrator could have reached on the material facts before the third respondent.
- 10.2. At the disciplinary hearing, the initiator was the only witness for the employer and there was no corroboration of the initiator's evidence. The applicant was not afforded an opportunity to cross-examine the initiator during the disciplinary hearing.
- 10.3. No evidence was led by the first respondent to prove the case of gross negligence.
- 10.4. The applicant was not informed that the safe was working on 24 February 2020 and would not have known that the safe had been fixed.

Submissions by the parties

Applicant's submission

- [11] Mr Zungu, for the applicant, submitted that the arbitration award was improperly obtained. On 19 February 2020, the applicant reported to Ms Helena that the safe in the truck was faulty. The safe was not turning. On 27 February 2020, an email was sent confirming that the safe was fixed on 24 February 2020. On 25 February 2020 (second robbery) applicant conceded that the safe was working.

[12] On 25 February 2020, during the second robbery, the applicant was trying to fold the money and drop it into the safe. He was robbed before dropping the money into the safe. The commissioner created her own facts when she concluded that the money was found in the applicants' pockets. This conclusion was not supported by the facts. The commissioner incorrectly recorded the

facts

and consequently, the award is unreasonable. The commissioner failed to consider the circumstances under which the money was found

in the applicant's possession. The other amount of money collected that day was dropped into the safe except the two amounts

found in the applicant's possession.

[13] Mr Zungu submitted that in the first robbery on 19 February 2020, the applicant did not follow the cash handling procedure as the safe was not working. In the second robbery on 25 February 2020, the applicant followed the cash handling procedure.

[14] Mr Zungu further submitted that after the two robberies, the applicant was allowed to continue working as normal and therefore the commissioner's finding in respect of the trust relationship between the applicant and the employer was wrong. The applicant was charged on 20 March 2020. The employer did not lead evidence of the breakdown of the trust relationship. The trust relationship between the applicant and the employer still exists.

[15] On procedural challenge, the arguments went as follows: there was nothing wrong with the initiator testifying during the disciplinary hearing. However, the evidence of the initiator was not corroborated hence the dismissal was procedurally unfair. Furthermore, the applicant was not given an opportunity to cross-examine the initiator during the disciplinary hearing. The commissioner's finding on procedural fairness was therefore unreasonable.

Respondent's

submissions

[16] Mr Mofokeng, on behalf of the employer, submitted that on 19 February 2020, the applicant was robbed of an amount of R7 320. The applicant indicated that he could not drop the money into the safe because the safe was not working. The applicant orally reported the malfunctioning safe to Ms Helena. This was not in terms of the procedure at the workplace as this was not reported in the defect vehicle daily checklist, which was supposed to be in writing.

- [17] The applicant's version is contradictory in respect of the robbery which took place on 25 February 2024. One version as contained in the supplementary affidavit is that the applicant was not aware that the safe was working on 25 February 2020 as he was not informed and in the founding affidavit, the applicant stated that the safe was working on 25 February 2020.
- [18] Mr Mofokeng submitted that the evidence shows that the safe was fixed on 24 February 2020. The evidence from Mr Lemmer was that the applicant was aware that the safe was fixed on 24 February 2020. The applicant in his statement stated that some of the money was found in his pockets on 25 February 2020. The applicant, on 25 February 2020, knew that the safe was working and there was no need for him to keep the money in his pockets. This was not in line with the cash handling procedures.
- [19] The video footage further showed that the applicant was not following the cash handling procedures as he would put money into his pockets.
- [20] Mr Mofokeng further submitted that Magwane Manuene, one of the witnesses of the employer, testified about the trust relationship. He testified that it is not fair for them to employ someone that they cannot trust.
- [21] In respect of the procedure, Mr Mofokeng submitted that the applicant was provided with an opportunity to cross-examine the initiator during the disciplinary hearing and the applicant had no questions for the initiator. The applicant further confirmed that he was given an opportunity to ask questions during the disciplinary hearing.
- [22] Mr Mofokeng submitted that the award of the commissioner was reasonable.

Evaluation

- [23] The review test is settled. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[2], the Supreme Court of Appeal held that:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the

proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

- [24] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[3], the Labour Appeal Court (LAC) held that the reviewing court must ascertain whether the arbitrator considered the principal issue

before him/her, evaluated the facts presented at the hearing, and came to a reasonable conclusion.

[25] In *Quest Flexible Staffing Solutions (Pty) Ltd (A division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*[4], the LAC held that:

‘[12] The test that the Labour Court is required to apply in a review of an arbitrator’s award is this: ‘Is the decision reached by the commissioner one that a reasonable decision maker could not reach?’ Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.’

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator’s award on review.’

[26] The applicant was charged with gross negligence for not following the cash handling procedure on 19 and 25 February 2020 respectively by failing to put money into the safe.

[27] The evidence before the arbitrator reveals that on 24 February 2020, the applicant reported that the safe was not working. The safe was fixed the same day and the applicant was aware that the safe was fixed on 24 February 2020. When the robbery took place on 25 February 2020, the safe was working.

[28] The cash handling procedure required the applicant to drop daily collections of money into the safe. The applicant was aware of the cash handling procedure.

[29] The fact that on 25 February 2020 when the robbery took place, the applicant had money in his possession (in his pockets), proves that the applicant failed to follow the cash handling procedure. There was absolutely no reason why the applicant was found with money in his possession.

[30] Furthermore, it doesn’t matter that other daily collections of money were dropped into the safe. What matters is that when the robbery took place, the applicant was found with money in his possession under the circumstances wherein the money was supposed to be inside the safe as per the cash handling procedure.

- [31] The further evidence which was before the commissioner, and which was unchallenged, was that the video footage showed that the applicant tended to put money in his pockets. The applicant's statement further confirmed that on 25 February 2020, the robbers took money which was in his pockets. Consequently, Mr Zungu's contention that the commissioner created evidence when she concluded that money was found in the applicant's pockets, has no merits.
- [32] Regarding the robbery which took place on 19 February 2020, the evidence before the commissioner was that the applicant failed to report that the safe was not working in terms of the defect vehicle daily checklist. This was a report which had to be in writing and not orally. This was a procedure at the workplace.
- [33] On 19 February 2020, the robbers found money underneath the driver's chair. The applicant did not drop the money into the safe. He did not report, as per the procedure, that the safe was not working. As a result of the gross negligence of the applicant, he was robbed of an amount of R7 320. Mr Zungu, conceded that on 19 February 2020, the applicant did not follow the cash handling procedure.
- [34] The submission by the applicant, that there was no evidence regarding the breakdown of the trust relationship between the applicant and the employer, has no merits. The evidence of Magwane Manuene was clear. The employer could not employ someone that they could not trust. The fact that the applicant was charged long after the two robberies did not mean that the trust relationship was in existence. The evidence shows that the employer was conducting an investigation after the two robberies. The applicant's submission in respect of the trust relationship has no merits.
- [35] In *National Union of Metalworkers of South Africa and Another v Commission for Conciliation, Mediation & Arbitration & others*[5], this Court held that:

[32] Negligence, in short, is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person and in the employment context, the employee's conduct is compared with the standard of skill and care that would have been expected of a reasonable employee in the same circumstances. The reasonable employee with whom the employee is compared must have experience and skill comparable with that of the employee charged. In labour law, negligence is not applied 'in vacuo' or against the general standard of a 'reasonable person', but it is applied in the context of the particular workplace or industry, considering the performance standards and procedures set by the employer. Negligence is usually established with reference to workplace rules or procedures applicable in the workplace.

...

- [35] The test for negligence remains the same- whether negligence, once established, is gross, is a matter of degree, to be determined considering a number of relevant factors. Those factors are inter alia whether the employee is persistently negligent, the seriousness of the

act or omission, the employee's awareness of the performance standard required or the procedure to be complied with, the seriousness of the consequences of the act or omission, damages caused and the skills and experience of the employee or the position held by the employee.'

- [36] The applicant's conduct amounted to gross negligence, and he was correctly found guilty by the commissioner. As previously stated, the applicant was aware of the cash handling procedure, and he failed to follow it. The applicant's transgressions occurred on 19 and 25 February 2020 respectively. The employer suffered losses as a result of the applicant's conduct. The applicant's transgressions were serious.
- [37] The commissioner considered all the material evidence before her. She properly applied her mind to the evidence. She correctly concluded that the failure by the applicant to follow the cash handling procedures caused financial loss to the employer.
- [38] The commissioner's arbitration award in respect of substantive fairness shows that the results were supported by evidence and the arbitration award was reasonable. The award is within the band of reasonableness.
- [39] In respect of the procedural challenge, Mr Zungu correctly conceded that there was nothing wrong with the initiator testifying during the disciplinary hearing. The only issue appears to be that the evidence of the initiator during the disciplinary hearing was not corroborated and therefore the commissioners' finding on procedure was unreasonable. This submission lacks merits. The fact that the initiator's evidence was not corroborated does not make the disciplinary hearing procedurally unfair.
- [40] The disciplinary hearing complied with item 4 of Schedule 8 of the LRA (Code of Good Practice). The Code of Good Practice does not refer to evidence that needs to be corroborated. Item 4 of the Code of Good Practice provides that:

'Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.'

- [41] In *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others* [6], the Court held that:

'It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged

misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.’

[42] The requirement that evidence must be corroborated during the disciplinary hearing does not exist in our law. To require corroboration of evidence in the disciplinary hearing would elevate a disciplinary hearing into a process akin to Court processes. Disciplinary hearings are informal in nature and there is no need to apply strict rules of law of evidence during the disciplinary hearing.

[43] Another challenge to the procedural finding was that during the disciplinary hearing, the applicant was not afforded an opportunity to cross-examine the initiator. This point lacks merits. The evidence before the commissioner shows that the applicant was afforded an opportunity to ask the initiator questions during the disciplinary hearing and he had no questions for the initiator.

[44] Consequently, the commissioner’s finding on procedure was supported by evidence. The procedural finding was reasonable.

[45] The commissioner’s award is unassailable. The commissioner considered the principal issues before her, evaluated the facts, and came to a reasonable decision.

[46] In the premises, I make the following order:

Order

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

H Molotsi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr S Zungu Instructed by: Ndobela and Associate Inc For the Respondent: Adv. X Mofokeng Instructed by: Poswa Inc

[1] Act 66 of 1995, as amended.

[2]

[2013] ZASCA 97;

[2013] 11 BLLR 1074 (SCA) at para 25.

[3]

[2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at para 16.

[4] (2015) 36 ILJ 968 at paras 12 – 13.

[5] (2023) 44 ILJ 1575 (LC) at paras 32 and 35.

[6]

[2006] ZALC 44; (2006) 27 ILJ 1644 (LC) at 1651F – G.

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