

SOUTH AFRICA / JUDGMENT

Khubeka v Metal Engineering Industries Bargaining Council and Others.rtf (JR1219/2021) [2024] ZALCJHB 249 (25 June 2024) [2024] ZALCJHB 249

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

JR 1219/2021

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: JR 1219/2021

In

the matter between:

SABELO

AMOS KHUBEKA

Applicant

and

METAL

ENGINEERING INDUSTRIES BARGAINING

COUNCIL

First Respondent

RAYMOND

ARNOLD DIBDEN N.O

Second Respondent

STEINMÜLLER

AFRICA – BILFINGER (PTY) LTD Third

Respondent

Heard:

6 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 25 June 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] Following a referral of an alleged unfair dismissal dispute, the Second Respondent (Arbitrator) in his award dated 21 May 2021, found that the dismissal of the Applicant by the Third Respondent (Steinmüller) was procedurally and substantively fair.
- [2] With this application which Steinmüller opposed, the Applicant seeks an order reviewing and setting aside the Arbitrator's award. He further seeks that the award be substituted with an order that his dismissal was substantively unfair, or in the alternative, remitting the matter back to the First Respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) for a hearing de novo. The CCMA is incorrectly cited in the Notice of Motion in that it was common cause that the dispute was referred to the Metal and Engineering Industries Bargaining Council (MEIBC). Although Steinmüller in its answering affidavit had taken issue with this incorrect citation and other defects in the Notice of Motion and the founding affidavit, I deem it appropriate to ignore them as they are not material, and thus propose to dispose of the matter mainly on its merits.

Background:

- [3] The Applicant was employed by Steinmüller with effect from August 2011 as a Fitting (Pipe) Supervisor. Part of his normal duties was to oversee his crew. He was based at a client's site (Eskom's Kriel Power Station), where Steinmüller rendered various services including welding. He was dismissed on 29 January 2020 following a disciplinary enquiry into allegations of misconduct related to theft of company property in the form of 'Nicro welding wire' (Welding rods).
- [4] The allegations of misconduct against the Applicant arise from an incident that took place on 22 September 2019 at Kriel Power Station. It was not in dispute that on that day, the Applicant had reported for his normal duties and parked his vehicle at the site. At the end of his shift at 18h00, he was about to drive out of the premises when his vehicle was subjected to a search by Eskom's security officers, Messrs Themba Ngozo and Themba Hlatshwayo.

- [5] The search followed upon an instruction by Eskom's Security Investigator Ezrom, after he had received a tip off from a whistleblower. Following a thorough search, the security officers found welding rods that were tied underneath the vehicle. The South African Police Services was alerted to the incident, which resulted in the Applicant's arrest.
- [6] Throughout the episode, the Applicant's position was to deny knowledge of the items and had alleged that he was a victim of a 'set up'. The Applicant was subsequently suspended, subjected to a disciplinary enquiry and thereafter dismissed. This had led to a referral to the MEIBC and when attempts at conciliation failed, the matter came before the Arbitrator leading to the impugned award.

The evidence before the Arbitrator:

- [7] Steinmüller had relied on the evidence of various witnesses. The first witness, Mr Nkosinathi Mdlalose, was the Storeman, who had testified regarding procedures in the Stores related to the removal and return of stock including welding rods by authorised personnel such as welders and welding supervisors. He confirmed that once stock was requested and issued, a record was not kept by welders as to the exact amount of welding rods that was used on specific welding jobs, but that a record was kept of surplus material that was returned to the Stores.
- [8] He had testified that it was always possible that not all the surplus stock was returned to the Stores because of failures to keep a record of how much was used on specific welding jobs. He had however testified that an inspection of the rods that were found underneath the Applicant's vehicle had revealed from their batch numbers and brown painting, that they belonged to Steinmüller, and that the type in question was not easily available on the open market.
- [9] One of the security officers who had conducted the search and found the items, Mr Ngozo, confirmed the results of the search, and testified that the search also came about after an anonymous tip-off that the Applicant was involved in the theft of company property.
- [10] Ngozo had testified that some days after the Applicant was subjected to a disciplinary enquiry, he came back to the premises to receive his outcome. Ngozo had to accompany him from the entrance to the venue where the hearing and outcome was to be heard. Ngozo testified that prior to the day that the Applicant arrived at the premises to collect his outcome, the latter had sent him and his family threatening messages because of the incident that led to his dismissal.
- [11] On their way to the hearing venue, the Applicant started talking about the incident that led to the welding rods being found underneath his vehicle and suggested that Zulu had conspired with Ezrom the Eskom's Investigator, to place them underneath his vehicle. He blamed Zulu as being behind the conspiracy because he had in the past, laid a complaint of misconduct against (Zulu), as his supervisor.

- [12] Ngozo testified that at the time, he was not aware that the Applicant was secretly recording their conversation. Ngozo had said something that suggested that there could have been a conspiracy between Zulu and Ezrom. Ngozo however testified that his response to the Applicant was in the light of the threatening message he and his family had received from him, and he was not however aware of any conspiracy against the Applicant.
- [13] Zulu also testified before the Arbitrator. He denied having been involved in any conspiracy against the Applicant. He was not aware of any complaint of misconduct against him lodged by the Applicant and had not been subjected to any disciplinary process because of any complaint lodged against him. He further denied having had anything to do with setting-up the Applicant. He contended that he was not even on the same shift with the Applicant or on the premises on the day that the searches were conducted. He also testified that because of the incident, the Applicant had threatened him and his family.
- [14] The Applicant's case before the Arbitrator was to rely on the secretly recorded conversation, he had with Ngozo for his contention that it was Zulu that had conspired against him by placing the items in his vehicle, and thereafter tipping-off Ezrom about them. This was after he had laid a complaint against Zulu as his supervisor about the latter's absence from duty or leaving the workplace without permission.
- [15] The Applicant also implicated another security officer, Theo Dubazana in the conspiracy. The Applicant further denied that the rods found underneath his vehicle belonged to Steinmüller and contended that they could have been bought in the open market, painted brown so that they looked like Steinmüller, and then placed where they were found by security officers, in order to frame him.

Arbitrator's findings:

- [16] The Arbitrator concluded that in the light of the common cause facts that the welding rods were found in his vehicle, the Applicant did not adduce any reliable or credible evidence to show how Zulu had conspired against him or had access to the rods in circumstances where on his own version, it was impossible for any unauthorised employee to access the material from the Stores.
- [17] The Arbitrator equally found no credible evidence to show that Zulu had accessed the Applicant's vehicle and placed the rods under it since the two were not on the same shift. The Arbitrator had made a separate ruling admitting the recorded conversation between Ngozo and the Applicant after an objection by Steinmüller to its admissibility. The Arbitrator however rejected the Applicant's contention that the recordings demonstrated that there was conspiracy between Zulu, Ezrom and other security officers, and concluded that the recordings merely demonstrated Ngozo's assumptions about who might have framed the Applicant.

[18] The Arbitrator further concluded that there was no documentary evidence to support the Applicant's evidence that he had reported Zulu for any misconduct at the workplace, and if so, whether any action was taken against the latter. He therefore concluded that there was no evidence to demonstrate that Zulu might have had any motive to implicate the Applicant, when it was common cause that they were not on the same shift and when Zulu was not even at the premises on the day in question. To this end, the Arbitrator concluded that on the common cause facts, the Applicant in his defence had merely relied on unproven conspiracies, and his dismissal was therefore fair.

Grounds of review and evaluation:

- [19] The test on review is trite. The enquiry is whether the arbitration award meets the threshold of reasonableness, and if not, this would warrant interference only if the impugned decision is of the kind that could not be made by a reasonable decision-maker. It is not the task of the reviewing Court to evaluate the reasons provided by the arbitrator with a view of determining whether it agrees with them or not. The principal enquiry is whether the award itself meets the requirement of reasonableness, in the sense that there are reasons supporting its conclusions, and that the decision was based on objective facts rather than conjecture or some other irrelevant considerations. Furthermore, 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[1].
- [20] Against the above legal principles, amongst the grounds of review raised by the Applicant was that the Arbitrator committed an irregularity in that he failed to apply his mind to the evidence before him especially in regards to his version that on the day in question, he was at his workplace and could not have had an opportunity to remove the welding rods from the workplace, and place them under his vehicle.
- [21] It was further submitted that the Arbitrator failed to appreciate the nature of the dispute before him by failing to consider the fact that there was no direct evidence suggesting that he was involved in the theft of the rods because Mdlalose the Storeman had confirmed that it was difficult to access the welding rods from the Stores.
- [22] In this regard, it was submitted that in the absence of direct evidence further confirming that he was seen placing the rods underneath his vehicle, the Arbitrator relied on circumstantial evidence, and therefore Steinhöller did not discharge its duty of establishing a prima facie case which would then have called upon the Applicant to provide an explanation as to how the welding rods ended up in his vehicle. It was accordingly submitted that the Arbitrator failed to appreciate that there were several possibilities that indicated that the Applicant was not the only person who could have been responsible for placing the rods underneath his vehicle.

[23] Furthermore, it was submitted that the same or similar rods found underneath the vehicle were also easily accessible in the open market, and it was therefore probable that the people involved in setting him up, could easily have bought them and placed them underneath his vehicle.

[24] Steinmuller's position in opposing the grounds of review was that the award was unassailable and fell within the bounds of reasonableness in the light of the material evidence properly considered by the Arbitrator. It was submitted that the Arbitrator conducted a proper assessment of the evidence and weighed the probabilities of different versions in reaching his conclusions.

[25] Having had regard to the legal framework and the submissions made on behalf of the parties as summarised above, the invariable conclusion to be reached based on the evidence before the Arbitrator, is that the decision that he had arrived at is unassailable, as it falls within the bounds of reasonableness for the following reasons;

25.1 To the extent that the Applicant submitted that the Arbitrator failed to properly apply his mind to the evidence, that contention ought to be considered within the common cause facts.

25.2 It was not in dispute that the welding rods were found tied underneath the Applicant's vehicle, and by extension, the rods were in the applicant's possession. Clearly this was direct evidence which Steinmüller and the Arbitrator relied on in assessing his culpability. This meant that the Applicant was required to explain the circumstances under which the rods came to be tied underneath his vehicle.

25.3 The welding rods found in the Applicant's vehicle were properly identified by Mdlalose as belonging to Steinmüller. Mdlalose had further explained that once stock of rods was issued to authorised persons, it is not known how much of it would be used for official welding purposes and how much would be left over. This implied that it was easy for employees to remove surplus stock without returning it to the Stores, even if some of it may have been returned.

25.4 Against Mdlalose's testimony, the Applicant alleged Zulu and other security officers that conspired against him by obtaining similar rods in the open market, painted them brown to make them look like Steinmüller's, and thereafter placed them underneath his vehicle whilst he was busy during his shift.

25.5 Clearly the Applicant's primary defence of a conspiracy theory is not only improbable but is so far-fetched, that it borders on the ludicrous. The basis of this conclusion is that first, the security officers that had searched his vehicle and found the welding rods were employed by Eskom. I fail to appreciate what possible motive would have compelled them to conspire with Zulu to go out of their way to find similar rods in the open market, paint them brown, and take the onerous effort of placing them under the Applicant's vehicle to get him dismissed.

25.6 A second consideration was that the Applicant alleged that Zulu was motivated to conspire against him because of complaints he had laid against him for misconduct. Against these allegations, there was no record of any of these complaints against Zulu, and furthermore, it was not in dispute that Zulu did not share a shift with the Applicant on the day that the rods were found, nor was he at the premises during the day shift.

25.7 The Applicant's contentions that the Arbitrator failed to consider the surreptitiously obtained recordings of his conversation with Ngozo, or that he failed to consider that Steinmüller failed to call upon the whistleblower and Ezrom to testify about the tip-off he received equally lacks merit. This is so in the light of the conspiracy theory having been rejected as improbable, and further since any such evidence would not have

taken the matter further in the light of its irrelevance as against the direct evidence that implicated him.

25.8 In the end, since it was not in dispute that the welding rods were found underneath the Applicant's vehicle as he attempted to exit the premises after his shift, it can be accepted that in the absence of any direct evidence that the applicant had removed the rods from the workplace and placed them underneath his vehicle, the Arbitrator was clearly confronted with circumstantial evidence.

25.9 The approach in dealing with circumstantial evidence is trite flowing from the principles set out in *R v Blom*[2]. Thus, the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. A second consideration is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. In the end, the facts from which inferences are to be drawn must from a holistic consideration, be true and proven[3].

25.10 What was in issue before the Arbitrator was whether the inference that the applicant committed the misconduct could be drawn from all of the proven facts and whether these proven facts excluded every reasonable inference from them save the one sought to be drawn.

In the absence of any logical or reasonable explanation by the Applicant as to how the welding rods landed in his vehicle, and in the light of his spurious conspiracy theory having been debunked, the most probable inference to be drawn from the proven facts is that he indeed attempted to unlawfully remove the welding rods from the premises. This is further based on the uncontested evidence that the Applicant had parked his vehicle on the premises but outside the range of security cameras. On uncontested evidence, he had at some point during his shift left his team at the boiler workshop and went to the Stores for some considerable period without an explanation. It is apparent that he had the motive and opportunity to carry out his nefarious intentions, until he was caught out as he attempted to leave the premises.

[26] It has long been stated in *De Beers Consolidated Mines Ltd v CCMA & others*[4], that a dismissal should not be an expression of moral outrage or an act of vengeance, but rather should be a sensible operational

response to risk management in the enterprise. In this case, as can be gleaned from the inferences drawn from the proven facts, it is apparent that the nature of misconduct which involved dishonesty and deceit, was of a gross nature, necessitating a dismissal.

[27] Theft in itself invariably destroys any trust relationship between an employer and an employee[5]. The Applicant in this case was a senior employee, entrusted with ensuring the protection and proper utilisation of company property.

In attempting to steal the welding rods, the Applicant breached that trust. To compound the gross nature of his conduct, at no point did he show any form of contrition or acknowledgement of any wrong-doing. On the opposite end, he had adopted an untenable stance in reliance on an improbable and ridiculous conspiracy theory, whilst the facts as objectively, reasonably and appropriately evaluated by the Arbitrator, pointed to the misconduct in question having been proven.

[28] As was in *Autozone*[6], the nature of the offence and the manner of its commission support a conclusion that the continuation of the relationship had become intolerable, and that its termination was necessary in response to operational risks that the Applicant posed to Steinmüller. Against all these considerations, it follows that the review application is meritless, and thus ought to fail.

[29] In regards to the procedural fairness of the dismissal, it needs to be pointed out that in the Notice of Motion, no relief was sought in that regard. Notwithstanding that omission, and for the sake of completeness, it needs to be said outrightly that there is no

merit in the contention that the Chairperson of the Appeal hearing did not properly explain the Applicant's rights, or that the process was flawed because its chairperson was a manager of a lower status to that of the chairperson of the initial enquiry. The undisputed evidence of Ms de Jager on behalf of Steinmüller was that a depot manager from another branch who was senior to the chairperson of the disciplinary enquiry, was appointed as appeal chairperson. The Arbitrator's conclusions that the Applicant could not even demonstrate any prejudice in relation to the manner that the appeal hearing was conducted, and that in the end his dismissal was procedurally fair, can equally not be faulted.

[30] Steinmüller sought an order of costs. Inasmuch I am of the view that the review application lacked merit and that the Applicant ought to have seriously reflected on the merits of his case prior to prosecuting it, I however upon a consideration of law and fairness, deem it appropriate that each party must be burdened with its own costs

[31] Accordingly, the following order is made:

Order:

1. The application to review and set aside the arbitration award issued by the Second Respondent under Case Number MPEM 1292 – 20 is dismissed.
2. Each party is to pay its own costs.

Edwin Tlhotlhalemajie

Judge of the Labour Court of South Africa

Appearance:

For the Applicant: M T Xaba of Ngomana & Associates Attorneys

For the Third Respondent: A Bakker of Anton Bakker Attorneys

[1] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*

(2007) 28 ILJ 2405 (CC) at para 110 *Duncanmec (Pty) Limited v Gaylard NO and Others*

[2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) at paras 41 – 43; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)* 2013

(6) SA 224 (SCA) at para 25; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*

(2014) 35 ILJ 943 (LAC); *Makuleni v Standard Bank of South Africa Ltd and Others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC);

[2] 1939 AD 188 at 202

- 3.

[3] *National Union of Mineworkers and Another v Mogale Gold, A Division of Mintails (SA) (Pty) Ltd*

[2015] ZALAC 32; [2015] 10 BLLR 1016 (LAC); (2015) 36 ILJ 2815 (LAC) at para 25.

[4]

[2000] 9 BLLR 995 (LAC) at para 22.

[5] See *Autozone v Dispute Resolution Centre of Motor Industry and Others*

[2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC) at para 13 where it was held; 'Dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational

difficulty. The employer thereafter will be hard pressed to place trust in such an employee. It will be difficult going forward for any task involving a measure of discretion or reliance to be entrusted to the deceitful employee. The operational requirements of the employer alone, therefore, may very well justify the dismissal...'

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[6] *Supra*.

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