

SOUTH AFRICA / JUDGMENT

Klassen v Commission for Conciliation Mediation And Arbitration and Others (JR293/12) [2014] ZALCJHB 461 (24 November 2014)

[2014] ZALCJHB 461

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JR293/12

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REPUBLIC

OF SOUTH AFRICA

THE

LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

Not

reportable

Case

no: JR 293/12

In

the matter between:

DENNIS STEPHEN

KLASSEN

First

Applicant

And

COMMISSION FOR

CONCILIATION, MEDIATION AND ARBITRATION

First

Respondent

COMMISSIONER R

MUDAU (N.O.)

Second

Respondent

TELKOM

SA LTD

Third
Respondent

Delivered: 24/11/2014

Summary: (Review – arbitrator inferring
less complicated version on the evidence – not unreasonable –
argument cannot add
to pleaded grounds of review – obiter,
where employee acknowledges impact of
fraud on the trust relationship, proof of breakdown not necessary)

JUDGMENT

LAGRANGE, J

Introduction

- [1] The applicant in this matter was an Executive Manager (Network Field Operations) of the third respondent, Telkom SA Ltd, until the date of his dismissal for misconduct on 6 August 2009. The applicant was found guilty on three of the four charges against him. For the sake of clarity all four charges may be mentioned, namely:
1. Transgression of Telkom IT policies by using Telkom resources for private business contravening sections 3 of the information Security policy, section 16 of the desktop usage policy in section 7.2 a of the Email policy through using Telkom personnel to do non-Telkom business-related work with Telkom facilities.
 2. Committed fraud by approving the request for cheque to the value of R 48000-00 for Van der Merwe butchery whilst you knew that no order or delivery had taken place in respect of the payment.
 3. Fraudulent S & T claim in that on 20 March 2008 you claimed 522 km in respect of a supposedly business trip from Ferndale to Wolmaranstad and back to Ferndale whilst you in fact travelled to Cape Town with a hired vehicle (Audi WTF 676 GP) and the period coincides with Easter.
 4. You committed a fraudulent act by concealing your absence from work for the period 20 to 25 March 2008 by creating the impression that you are undertaking a business trip to Wolmaranstad whilst you were on a private trip via Upington to Cape Town.”
- [2] At the disciplinary enquiry, which was held in absentia and during which nine witnesses were called, the applicant was found guilty of the first three charges. The fourth charge was withdrawn.

- [3] The applicant referred an unfair dismissal claim to the first respondent, the CCMA. The arbitration proceedings were conducted before the second respondent ('the arbitrator'). In the course of those proceedings, no less than 20 witnesses were called by the parties, half being called by the applicant and the other half being called by Telkom. The applicant challenged both the

procedural and substantive fairness of his dismissal. In consideration of the evidence the arbitrator concluded that the applicant was guilty of the first and third charges. On the second charge he found that even though he was satisfied that Telkom established that payment was made to the butchery in question without following the procedures, it had not proved that it was fraudulent. Consequently, he found the applicant not guilty of the second charge. Considering that the fraudulent transaction was destructive of the trust relationship and given the position that the applicant occupied, the arbitrator upheld the sanction of dismissal.

- [4] In respect of the claim of procedural unfairness, the arbitrator concluded that the applicant's complaint that the second notice of his enquiry which was issued on 3 August for the hearing scheduled for 6 August 2009 was unfair because it was less than the 3 days required by Telkom's procedures, was ill founded. The hearing had already been postponed at least twice before that year. The fact that the final notice did not comply with the time period in the procedure did not make it unfair because the prior notices had served the purpose of giving the applicant a sufficient opportunity to prepare. Consequently, the applicant did

not suffer any procedural unfairness.

Preliminary matters

- [5] The review application had been filed approximately four weeks late and Telkom opposed the applicant's condonation for the late filing thereof. While the explanation for the delay is not particularly good, the delay did take place at least in part as a result of the annual shutdown, and even though the merits are not good for the reasons stated below, the prejudice to the respondent is not significant. In the circumstances, I am willing to allow the application to proceed.
- [6] The day after the matter was heard, Telkom filed a supplementary affidavit seeking leave to supplement the record for missing portions of evidence given by Mr Albertus Venter. It appears that this only became apparent to Telkom's employee relations specialist dealing with the matter when he read the applicant's contention in his heads of argument that Telkom did not lead evidence of the trust relationship being broken in the arbitration proceedings. It appears that the filing of this affidavit led to the matter not been recorded as a reserved judgement as it was possible that further developments might have taken place as a result

of this application. No opposing affidavit was filed neither is there any record in the file of Telkom requesting this application to be set down. In short, this application has never been finalised.

- [7] The pleadings in this matter had obviously already closed and the third respondent has not pursued its application despite more than ample time to do so. In the circumstances, there is no reason not to finalise the matter on what was before the Court.

The grounds of review

- [8] I am cognisant of the fact that when the matter was argued before me that the leading decisions in relation to the assessment of the reasonableness of an arbitration award in the cases of Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others[1] and Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)
- [2] had not been handed down and the earlier decision of the LAC in Herholdt v Nedbank Ltd [3] was only handed down the day after this matter was argued. In any event whether one considers the review application in the light of the SCA decision in Herholdt or in the light of the authoritative decision in Sidumo & Another v Rustenburg Platinum Mines Ltd & others [4], which the SCA decision in Herholdt expressly reaffirms[5], it does not make much practical difference in the application of the review test in this case, given that the essential grounds of review attack the reasonableness of the arbitrator's decision and does not rely on so called latent process related irregularity, which was briefly entertained as an easier path to a successful review until the SCA decision in Herholdt. It is worth recalling in this regard the decision in Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others[6] in which the LAC stated, apropos the effect of applying the outcome based approach endorsed in Sidumo, viz:

"Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award." [7]

It is the approach to reasonableness as laid down in Sidumo and reaffirmed eventually by the SCA in Herholdt that I have adopted in considering this application.

Grounds of Review

- [9] Insofar as the applicant sought to advance additional grounds of review in his heads of argument, these have not been considered as he is confined to what is set out in his founding and supplementary affidavits in relation to the factual basis of the review application.

- [10] In essence the applicant takes issue with the findings of the Commissioner that:

10.1 The notice of the disciplinary enquiry was not insufficient and therefore not procedurally unfair.

10.2 The evidence found on the applicant's computer and that of his secretary established that he had made use company property for his private purposes.

10.3 He had made a fraudulent claim in claiming an S and T allowance for the trip to Wolmaranstad, when the Commissioner accepted that such a trip was made.

10.4 The fraudulent claims destroyed the trust relationship particularly given the position occupied by the applicant.

[11] Further, the applicant submits that, in the absence of a basis for a finding of fraud and given that the main reason for his dismissal originally had been the charge relating to the butchery, the arbitrator's finding that dismissal was justified was grossly irregular and unreasonable.

[12] At the outset, it must be said that the framing of the grounds of review were more akin to grounds of appeal. Be that as it may, I have treated them essentially as a challenge to the reasonableness of the Commissioner's findings on the basis that no reasonable Commissioner could have arrived at them. Without adopting this approach, some of the grounds mentioned could not be entertained.

[13] It should also be mentioned that in his founding affidavit the applicant made reference to the demands made for his removal from office apparently initiated by the Communication Workers Union, which he appears to suggest was the real motive for the disciplinary action taken against him. However, the applicant referred his dismissal claim to the CCMA as an unfair dismissal for misconduct. Had he wished to base his claim on one of the grounds of automatically unfair dismissal, such as being dismissed for an arbitrary reason on account of racism the appropriate forum to pursue this would have been the Labour Court. Accordingly, it was not within

the remit of the arbitrator to determine the fairness of his dismissal on the basis of an illegitimate ground of dismissal, but

only whether he was guilty of misconduct and if the appropriate sanction was termination.

Evaluation

Insufficient notice of the enquiry

[14] The applicant first received notice of a disciplinary enquiry in December 2008 when a charge sheet containing 7 charges was delivered to his house with notice to attend a disciplinary enquiry on 22 January 2009, which was subsequently postponed to 26 January 2009. On the day of the enquiry he notified the employer that he was unable to attend owing to been hospitalised in Bellville. The enquiry was then postponed sine die. In July 2009 he received a further notice to attend an enquiry in Pretoria scheduled for 22 July 2009. Once again on the day of the enquiry he advised that he was unable to attend due to his disability and that he was permanently medically unfit. He also demanded that a grievance he had previously referred in April 2008 in which he had alleged victimisation, racism and violation

of his constitutional rights should be resolved first. By way of background concerning his medical condition, it should be mentioned that he had submitted an injury on duty claim to the compensation Commissioner in April 2008 relating to stress related illness and filed a report declaring him permanently medically unfit. Initially he was booked off for a period of six months and submitted

a claim for temporary disability which he was eventually paid out for. On 25 May 2009 he submitted an application for permanent

disability.

- [15] On 3 August 2009 another notice to attend the enquiry was served on his home. He was not in town as he put it. The enquiry was scheduled to take place in Pretoria three days later on 6 August 2009 and he claims he only received it some days after he had returned home by which stage that date had already passed. The disciplinary notice also indicated that if his temporary disability leave was granted he would be paid for the unpaid sick leave previously taken.
- [16] A substantial part of the applicant's complaint about the notice of the enquiry was that he was given less than three days notice of it as required by the procedure and moreover it was served on his wife as he was not in Cape Town. Another factor he believes which ought to be considered by the Commissioner was that the charges had been altered and reduced from seven to four in number. He argued that the Commissioner failed to appreciate that once the first notice was replaced with a notice which gave different reasons for the enquiry the commissioner ought to have treated the first notice as a nullity for the purposes of determining whether he had received sufficient notice in terms of the procedure.
- [17] Telkom points out that the procedure containing the three days notice requirement was not applicable to executive employees like the applicant. By the time the last notice of the enquiry was issued the Compensation Commissioner had already rejected the applicant's application for permanent disability benefits. It also points out that there is no explanation given by the applicant why he was not at home when he was supposed to be tendering her services. Most pertinently, Telkom makes the point that the notice of enquiry issued in June 2009 for the hearing scheduled on 22 July 2009 contained identical charges to the later notice served at his home in August.
- [18] In the circumstances, the applicant effectively had more than a month's notice of the nature of the charges and I can find nothing inherently unreasonable about the arbitrator's conclusion that he had sufficient time to prepare himself for that hearing.

Private use of company property

- [19] Essentially, the applicant claims that his evidence explaining the presence of a letter on his computer and identically worded ones was not disputed. The explanation was that he had deliberately produced the letters and forward them to his secretary to investigate if an authorised access to his computer had been obtained by Telkom. He denied that the letters

had ever been forwarded to any third party, for business purposes, but only to his secretary. Effectively, he criticises the arbitrator for not accepting that the presence of the letters on Telkom's computers was a result of his elaborate plan to expose that an authorised access to his computer had taken place. By implication, the arbitrator could not reasonably have concluded that a less contrived explanation for the presence of the letters, was indeed that he was using Telkom computer equipment for conducting some of his private business.

[20] Telkom contends that evidence was adduced at the arbitration hearing to show that the access gained to the applicant's computer was not unauthorised. In the arbitration, undisputed evidence was provided that the applicant's wife was a director of Wozani Security (Pty) Ltd. When the applicant's and his secretary's computers were accessed by Telkom, two very similar letters apparently concerning the suspension of an employee by Wozani Security were found on their computers. As mentioned the applicant had an elaborate explanation for this. During the course of his cross-examination he was asked why he simply did not use a fake

number for the company on the two letters rather than its genuine telephone number if he had simply wanted to set a trap. His initial

response to that detail was irrelevant, but when pressed his explanation appeared to be that by using the correct number Telkom

could then see if there was any communication between him and the company. Other evidence indicated that he had not declared his

interest as a shareholder in the company.

[21] The arbitrator was faced with two explanations for the presence of the draft letters on the computers. The applicant's explanation was one possible, but somewhat convoluted and elaborate explanation. The other explanation was simply that, he had been making use of his computer and his secretary's time and computer to prepare correspondence for the company in which he was a shareholder and his wife was a director. The content of the draft letter appears to have been carefully drafted for a particular purpose, namely the suspension of an employee. Given the choice of explanations for the existence of the draft letters on the computers, it cannot be said that the arbitrator came to the conclusion which no reasonable person could have reached simply because he did not choose the applicants explanation. That is sufficient reason to dismiss this ground of review. In passing, it can also be said that, on the face of the evidence, the arbitrator in fact adopted the more probable explanation. Be that as it may, it is not necessary for the purposes of determining the reasonableness of the arbitrator's finding to go that far.

Fraudulent nature of S and T claim

[22] The fundamental contention of the applicant on this charge is that the arbitrator could not reasonably have found him guilty of the charge having accepted that he had indeed made a business trip in question to Wolmaranstad. As such he was entitled to make an S and T claim

and his claim could not have been fraudulent. The claim was for a return trip from Ferndale to Wolmaranstad, been a total distance of 522 km, but the arbitrator was satisfied that the evidence showed that even though he travelled to Wolmaranstad he did not return to Ferndale consequently he ought not to have claimed for the return leg of the trip. The applicant had alleged that he had returned to Ferndale and then had driven to Upington and from there had travelled to Cape Town

with his family which he had joined in Upington.

- [23] Evidence was led that the applicant signed the claim form for the kilometres supposedly travelled. The applicant had testified that he had gone to Wolmaranstad to decide on the merging of two yards. He claims that on that day his family went with him in another vehicle. He had to return to Johannesburg that afternoon because there were two functions he had to go to in connection with work, though no supporting evidence of these functions was provided. He parted from his family at Wolmaranstad and accidentally left his cellphone in the car they were travelling in. This was how he explained calls made during the course of that afternoon on the phone in the Vryburg, Kuruman and Upington areas.
- [24] He claimed that he drove back from Ferndale all the way to Upington and reached his family around midnight that evening. Given the agreed distance of further return trip to Ferndale of over 500 km and the distance from Johannesburg to Upington, the applicant would have travelled approximately 1400 km that day, though he estimated it to be about 1200km. When the onerous nature of such

extensive driving on a single day was put to the applicant, he said that driving 1000 km a day was nothing to him in his line of work. The employer's case was that the applicant had never return to Ferndale admitted travelled on to Upington with his family and accordingly the S and T claim for the return leg of a trip to Wolmaranstad was fraudulent.

- [25] There was evidence from a senior manager that in principle, a claim for the returned leg of the journey could be made because the individual would have to return to their home. However he agreed that where the return trip was not actually made from the business destination to which the employee had travelled that was an exceptional situation which would require special approval and one could not simply claim as if one had travelled before distance of the return trip. In any event, the applicant's claim was that he actually had travelled the distance back to Ferndale and not that he was entitled to an allowance for a putative return journey, even though he had flown back from Cape Town to Johannesburg when he returned.
- [26] Once again, the arbitrator was faced with two possible explanations for the objective evidence. One was that the applicant was going away for the weekend after attending to business in Wolmaranstad and took his family with him and they all then travelled on to Upington in a single vehicle. The other explanation is that the applicant had arranged an extraordinarily demanding work schedule on the eve of a long weekend, which required him to return to Johannesburg and then rejoin his family, who in the meantime had

travelled Upington in a separate vehicle. Another complicating factor is that one of the two vehicles would have to have been left behind in Upington, because the applicant flew from Upington to Cape Town for a fishing trip, while his family drove to Cape Town. The applicant's version of events is a possible one and so is the more simple explanation, which the arbitrator clearly preferred. The arbitrator cannot be faulted for his choice of inferences he regarded as more probable.

- [27] Having reached that conclusion which was not unreasonable, that has ramifications for the rest of his reasoning which resulted in him confirming the applicant's dismissal as fair.

The fraudulent claim was destructive of the trust relationship

- [28] It is inherent in the applicant's argument that the arbitrator was unreasonable in arriving at this conclusion that this was because there was no fraud involved as he was on a legitimate business trip. Thus, the applicant is alive to the fact that if the claim was not legitimate it would have a bearing on the trust relationship. Given that the arbitrator had reasonably concluded that the applicant had made a fraudulent S and T claim, on the applicant's own logic it would then follow that this would

have negatively affected the trust relationship. The arbitrator further considered the relatively senior position of the applicant as an aggravating factor in considering the trust relationship going forward. There is nothing inherently unreasonable in that line of thinking.

- [29] As mentioned above, it was argued that no specific evidence was supposedly led about the destruction of the trust relationship, and in argument it was suggested that this was another reason the arbitrator could not have decided that the finding on the S&T

claim was destructive of the trust relationship. This argument is premised on the authority of *Edcon Ltd v Pillemer NO & others*[8]. However, firstly this was never raised as a ground of review in the founding and supplementary affidavits, so it is not properly before the Court. A party cannot set out new grounds of review when it has failed to set out the factual averments underpinning those grounds in its founding papers.[9] Secondly, in his own argument that dismissal is inappropriate because fraud could not reasonably have been established, the applicant

tacitly acknowledges the importance of a finding of fraud to the suitability of the sanction of dismissal.

Sanction was inappropriate

- [30] I need not address this further in the light of the reasoning above, as it is clear in the circumstances that once it is accepted that the applicant, as senior manager, made a fraudulent S&T claim, that this would damage the trust relationship. When coupled with the other offence he was found guilty of by the Commissioner, it cannot be said that the arbitrator was unreasonable in concluding that the dismissal should be upheld. It must also be mentioned that the mere fact that an arbitrator says words to the effect that they have no

reason to depart from the sanction decided on by the employer, does not mean the arbitrator has deferred to the employer's judgment. That much is obvious in this case, where the arbitrator acquitted the applicant of one of the fraud claims.

[31] It was also argued that the arbitrator should have realised that once he acquitted the applicant of the butchery fraud claim, the employer's main ground for his dismissal fell away and therefore to persist with the sanction of dismissal was unreasonable. The arbitrator clearly made his decision with reference to the charges he upheld and a finding of guilt on both of those can reasonably justify the dismissal of someone in the applicant's position.

Order

[32] The applicant's late filing of his review application is condoned.

[33] The applicant's review application is dismissed with no order as to costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: J A Oberholzer

Instructed by:

Dirk Coetzee Attorneys

For the Third Respondent: M Ramotlou of Maseremule Inc.

[1]

(2014) 35 ILJ 943 (LAC)

[2] 2013 (6) SA 224 (SCA)

[3]

(2012) 33 ILJ 1789 (LAC)

[4]

(2007) 28 ILJ 2405 (CC)

[5] At 2803-6, paras [15] – [25].

[6]

(2008) 29 ILJ 964 (LAC)

- [7] At 997, para [103].
- [8] (2009) 30 ILJ 2642 (SCA)
- [9] See Comtech (Pty) Ltd v Molony N.O and others [2007] ZALAC 35 (21 December 2007), at paras [15] – [17].
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Prepared on 11 October 2026 · Esheria