

SOUTH AFRICA / JUDGMENT

Lomeza Mining Services v Commission For Conciliation Mediation And Arbitration and Others (JR1547/21) [2024] ZALCJHB 295 (12 August 2024)

[2024] ZALCJHB 295

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JR1547/21

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THE LABOUR COURT OF
SOUTH AFRICA
AT JOHANNESBURG

Not Reportable

Case

no: JR 1547/2021

In

the matter between:

LOMEZA
MINING SERVICES
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION AND ARBITRATION
First
Respondent
COMMISSIONER
ADRIAAN BOTHA (N.O.)
Second
Respondent
AMCU
obo MANDLA PETROS BUDA
Third
Respondent

Heard:

31 July 2024

Delivered:	This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 12 August 2024
Summary:	(Review – Arbitrator's failure to accept finding of guilt on one charge and error regarding onus to prove a defence to a charge of unauthorised absenteeism leading to arbitrator failing to appreciate material issues and evidence – findings were ones no reasonable arbitrator could have reached – Pleaded grounds of review may not be supplemented in argument - award set aside and substituted)

JUDGMENT

LAGRANGE, J

Introduction

- [1] The third respondent, Mr M Bunda ('Bunda') had been employed as an articulated dump truck operator ('ADT operator') since 14 October 2018. On 26 February 2021, Bunda was dismissed for being absent from work without permission and for misappropriation of company property. He pleaded not guilty to but guilty to misuse of company property. He claimed his dismissal was substantively unfair.
- [2] The company property in question was a laptop which Bunda had in his possession. It appears he was issued with the laptop while he was undergoing a training programme conducted by the Human Resources department. During that time, he stayed with his girlfriend. When he had to return to his job as an ADT operator, he had to leave the premises he shared with his girlfriend, but he left his valuables and the laptop with her. She subsequently returned to Durban at the end of the year, and he never recovered the laptop. In October 2020, he was asked by the new IT manager to return the laptop, but it had still not been recovered by him by the time the arbitration hearing took place in July 2021. At the disciplinary hearing when he pleaded guilty to 'misuse' of the laptop he offered to buy it.
- [3] The alleged unauthorised absenteeism took place on nine days 9, 10, 11 and 19 December 2020 and 2, 3, 4, 10 and 17 January 2021. Bunda claimed his absence was owing to illness, apart from 17 January when he had to drive to visit his brother in Tshwane who had been involved in a vehicle accident. The arbitrator found that it was common cause that he had not submitted a medical certificate to substantiate his claim that he had been ill. Bunda's defence was that he had taken leave on the recommendation of the senior HR officer, Mr K

Jalubane ('Jalubane'), and his line foreman, Mr N Khambula ('Khambula'), neither of whom testified in the arbitration hearing, though the former represented the firm in the arbitration hearing.

- [4] Bunda had testified that on 10 January he was still ill and had to visit his brother in Johannesburg on 17 January. He alleged he had presented a medical certificate for his illness on 10 January. His brother had been hospitalised after a car accident and Bunda was the only family member with a vehicle. This reason for his absence on 17 January was not disputed. He also claimed to have informed Khambula by SMS of the reason for his absence on that occasion.

The award

- [5] The arbitrator found that Ms B Sikhonde ('Sikhonde'), the mine's HR manager, did not clarify in her testimony whether b1's absence was unauthorised or uncommunicated, and the record of the disciplinary inquiry did not shed any light on this either. Sikhonde claimed to have received a communication from Khambula and the control room that Bunda was absent without permission. She convened the inquiry with Khambula as the complainant when she heard from the control room. She did not communicate with Khambula before convening the inquiry and did not say if she was aware of Bunda's alleged sms to Khambula sent on 17 January. Even in the disciplinary enquiry there was no clear evidence anyone had testified that his absence was unauthorised or

not communicated to the employer.

- [6] The employer did not call Khambula to testify in the arbitration and Bunda had contended that this was because Khambula would have confirmed that he had authorised his absence. Bunda also testified that his illness had caused marks on his body, and in October 2020, he had sent photographs of the markings on his body to Jalubane, who also happened to be the employer's representative in the arbitration hearing. The arbitrator recorded that Bunda had revealed the marks on his body, which were still visible, at the arbitration hearing in July 2021. Bunda testified that Jalubane had suggested he should take sick leave and Khambula had approved ten days' sick leave from 9 December. He stated that he and Khambula had looked for leave forms at that time but, when none could be found, he was told he could complete the form on his return to work. He said he never did so, because he was issued with the charges on his return. Bunda claimed that the ten leave days were for his actual days he would have been on duty, which were not consecutive calendar days, because he worked on a staggered shift system.
- [7] The arbitrator found that it was the employer's responsibility to conduct a proper investigation into an employee's absence. Once the reasons for the absence were established, it was the employer who had to determine if the absence was justified. In this case, the respondent did not provide evidence to show that the absence was not justified. Even though the arbitrator accepted that Bunda had failed to provide medical certificates or some corroborating evidence of his brother's accident, his version that his line manager had

given him permission to take leave was not disputed. The arbitrator found that the fact that Bunda's leave was known or authorised was also confirmed when it was put to him under cross examination that he was told to return to work after leave on 4 January 2021.

- [8] The arbitrator drew an adverse inference from the failure of the employer to call anyone to rebut the claim that Khambula authorised his absence. Accordingly, the arbitrator concluded that the employer failed to make out a prima facie case that the absence was unauthorised. Even so, the arbitrator found that Bunda's failure to submit medical reports or corroborating evidence of his brother's car accident was "austere" in the context where the employer expected a reasonable explanation at the disciplinary inquiry.
- [9] The arbitrator had adopted a Cambridge dictionary definition of misappropriation, which described it as "the act of stealing something you have been trusted to take care of and using it for yourself" (arbitrator's emphasis). He noted Bunda's explanation how it went missing and his offer to replace it. He had claimed that he did not respond to the IT technician who phoned him in October to return the laptop, both because he did not know him, and he was ill at the time. The technician had testified that the HR department had asked him to retrieve the laptop from Bunda because he was no longer working in HR and had to return it. It appears from the evidence that Bunda had been working in the HR department for about a year, before he returned to his job as an ADT operator.
- [10] The arbitrator accepted that Bunda had disregarded his responsibility to report the missing laptop and should have answered the IT technician's request to return it. However, he noted that the employer did not give evidence that there was any harm suffered in consequence of the missing laptop and concluded that, because Bunda did not steal the laptop or take it for himself, he could not find him guilty of the charge of misappropriating it, despite Bunda having pleaded guilty to the charge.
- [11] The arbitrator turned his attention to the appropriateness of dismissal as a sanction "in the circumstances of the bona fide a loss of company property and absenteeism not on a balance of probabilities proven unauthorised or without justified reason". He noted that Bunda had no prior disciplinary record and then concluded, somewhat confusingly, that "both respondent and applicant reneged on the rational requirements of what was supposed to flow from the factual matrix of the dispute". In his view, the employer should have investigated and rationally considered Bunda's explanation for his whereabouts and the laptop loss. For his part, Bunda should have done more in timeously communicating his whereabouts and reasons for absenteeism and the loss of the laptop. He should have provided a medical certificate and some proof of his brother's accident. The arbitrator then concluded that neither party "would be entirely successful in their prayers" and therefore Bunda's dismissal was substantively unfair. He then ordered that Bunda should be reinstated without backpay but without any other disciplinary sanction.

Grounds of review

[12] As no supplementary affidavit was filed, the only grounds of review are those set out in the founding affidavit. In summary, the employer contends that the award was not one a reasonable arbitrator could have made on the evidence in the following respects:

12.1 He had ordered the re-instatement of Bunda despite overwhelming evidence that he was constantly asked to return the misappropriated laptop during his long absence. The IT technician who had phoned and sms'd him from 8 December to return the laptop said Bunda never responded to his calls or sms. He sent the sms explaining he was from the IT department, in case Bunda did not know who he was. He testified Bunda was supposed to return it when he left his temporary position in HR. He also had to report any breakage

or theft, so an insurance claim could be made. It was only when the disciplinary hearing was held two months later, that he learnt that the laptop was stolen. Bunda had never reported this to him, nor did he provide him with a police case number concerning the theft.

12.2 He had found Bunda's dismissal substantively unfair despite overwhelming evidence of his guilt. In support of this the employer cited as an example, the fact that he found that Bunda's absence was either known or authorised despite acknowledging the failure of Bunda to provide any substantiating evidence of the reasons for his absence.

[13] The employer also contends that the arbitrator committed a gross irregularity in the following ways:

13.1 In circumstances where the parties were not legally represented, he did not advise the parties' representatives of the consequences of not challenging their opponent's evidence or to call a material witness.

13.2 There was no rational connection between the evidence and his findings. An example of this was that He ignored the material evidence that Bunda had failed to submit any medical certificates or evidence of his brother's accident in concluding that his leave was known or authorised.

13.3 In concluding that there was no evidence that the leave was unauthorised, he failed to consider that the HR officer had been advised by the line control room that he was absent without leave and he had failed to comply with the company policy of filling in leave forms before he could be granted sick leave. The HR officer testified that she was alerted to his absence by the control room who confirmed with the line foreman that someone was AWOP. She also testified that Bunda's line supervisor, Khambula, had told

her that Bunda was AWOP.

13.4 The arbitrator irregularly decided the firm had failed in a duty to conduct further investigations into Bunda's reasons for his absence and for the loss of the laptop.

13.5 The arbitrator concluded without justification that re-employment was an appropriate order despite evidence that the only conclusion he could have drawn was that it was probable a future employment relationship would be intolerable. In elaborating on this in argument, the employer argued that the inescapable conclusion about Bunda's conduct was that he acted in bad faith in relation to both charges, even though he offered to recompense the firm for the missing laptop.

[14] When the matter was argued, Mr Nkosi, who appeared for the applicant raised a few additional grounds of review, some of which might well have had merit, but the court cannot entertain fresh grounds of review raised only in argument. In *Commercial Workers Union of SA v Tao Ying Metal Industries & others*[1], the Constitutional Court stated:

"[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible."

(emphasis added)

[15] Similarly, in *Comtech (Pty) Ltd v Molony NO and Others* (DA12/05) [2007] ZALAC 40 (21 December 2007), the Labour Appeal Court held:

"[13] The only ground of review that the appellant's Counsel pursued in argument before us was the one captured in par 15 of the founding affidavit. There the deponent to the founding affidavit said:

"Furthermore the first Respondent erred in his award in that he failed and/ or neglected and/or refused to apply his mind to the evidence lead (sic) at the arbitration proceedings, and furthermore did not apply his mind to the relevant case law, applicable to the facts of the matter which was presented to him, and therefore exceeding his powers as commissioner in not applying the relevant statutory authorities to the applicable facts of the case."

[14] The question which arose during argument was whether the appellant was entitled to seek to overturn the declaratory order of the commissioner that the dismissal was both substantively and procedurally unfair because it did not appear clearly from the founding affidavit that such findings were being challenged. It seems to me that the appellant was entitled to pursue whatever case fell within the ambit of par 15 of its founding affidavit.

[15] The difficulty with the appellant's case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A(2)(c) of the Rules of the Labour Court. Rule 7A(2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by "an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside." Rule 7A requires the notice

of motion to call upon, in this case, the commissioner “to show cause why the decision or proceeding should not be reviewed and corrected or set aside.”

- [16] In my view, the contents of par 15 of the founding affidavit relate to conclusions of law. There is nothing either in par 15 or anywhere else in the founding affidavit which sets out the factual grounds upon which the appellant sought to base its legal grounds of review. In par 15 of the founding affidavit the deponent said that the commissioner erred in his award in that he “failed and or neglected and/or refused to apply his mind to the evidence led at the arbitration proceedings” but did not motivate this bald allegation by reference either to the evidence or the award.”
- [16] The principle of setting out the factual basis of grounds of review is not a matter of drafting formalism. A party opposing a review is entitled to know when drafting any answering affidavit what the alleged factual or legal errors are which underpin the applicant’s grounds of review. Citing one ‘example’ of an alleged material error is also not sufficient, if the applicant wishes to rely on other material flaws, as well. The factual basis for a ground of review should not become apparent only when an applicant files heads of argument or advances additional grounds in oral argument, bar those matters where a jurisdictional point is raised for the first time. Accordingly, in this case, the court cannot have regard to additional grounds of review raised in argument for the first time. To indulge the practice of formulating cogent substantiated grounds of review only at the stage of filing heads of argument or later, would be tantamount to licensing review by ambush and thereby defeating the object of the founding and supplementary affidavits.

Evaluation

- [17] It is no exaggeration to say that the arbitrator’s reasoning was confused in more than one respect. He decided Bunda was not guilty of misappropriation of the laptop, notwithstanding him having pleaded guilty. He also could not make up his mind about the nature of the onus falling on each party in respect of the unauthorised absenteeism charge. This confusion materially affected his assessment of the evidence.
- [18] As a result of having found that Bunda was not guilty of misappropriation, notwithstanding his plea to the contrary, the arbitrator failed to consider that misconduct in deciding if he should be dismissed.
- [19] The applicant is correct in complaining that the arbitrator failed to consider that Bunda took no steps to return the laptop nor even to explain why he could not do so, until the disciplinary enquiry, two months later, when he tendered to pay for the laptop. He never even responded to the call and sms from the IT supervisor. It was true that he would not have known the IT technician because the latter had only been employed shortly before he tried to communicate with Bunda about the laptop. However, his explanation was that he never responded to him because he had never heard of him and because he was sick and out of town when the technician made the request to return it, was could not amount to a

justifiable explanation for his failure to take any steps to return the laptop. before On his own version, he apparently did not attempt to find out about the laptop's whereabouts, until he received

the charges. It is impossible to escape the inference that Bunda showed extreme indifference towards safeguarding the company property

which had been entrusted to him, by simply leaving it with his girlfriend when he was no longer living with her, when he was well

aware he had been instructed to return it. His excuse for inaction on receiving the technician's instruction on the basis he did not know him, when he received an sms clarifying from the technician confirming his identity, borders on the ridiculous. If he was so ill he could not return it or if he was 'out of town' he offered no explanation why he could not phone the HR department or phone the technician back to explain his difficulty in returning it. This was serious misconduct which the arbitrator ought to have taken account of it in determining if dismissal was an appropriate sanction but he failed to do so because he had effectively unilaterally decided to reverse Bunda's admission of guilt.

[20] In respect of Bunda's absence from work, there was no dispute he was absent for 9 shifts over the course of a month. The firm's evidence was that his absence from work was reported by his supervisor and control room. It claims that his leave ought to have been authorised on completed leave forms beforehand, but the HR manager who testified did not mention what the correct procedure was when she testified. The procedure only came up when Bunda testified and his evidence that leave forms could be completed on return to work. On Bunda's version, he had attempted to have the leave forms completed before he left, which tends to support the version that this was the normal practice. However, he was not challenged that the forms could never be completed on the employee's return to work, provided permission was granted beforehand. His explanation was that Khambula was willing to approve his leave beforehand, but when forms could not be found, Khambula told him he could fill it in on his return. He never did though, allegedly because he was issued with charges on his return to work.

[21] In his evidence in chief, Bunda testified that he fell in October 2020 when he was removed from the HR office, and that he spoke to Jalubane, who was the person who suggested that he should reduce his leave days because he had exhausted his sick leave. He also claimed that Jalubane knew about his medical condition at the time. Khambula also recommended he use some of his ordinary leave days. Strangely, even though Jalubane cross-examined Bunda, he never disputed Bunda's contentions about his own alleged role in the leave approval, nor did he question why this had not been put to Sikhonde when she testified. Nonetheless, it remains true, that no hint of Bunda's defence on the charge of absenteeism was given in the cross-examination of Sikhonde. Even if it could be assumed, based on the disciplinary enquiry documents that the employer ought to have known Bunda would claim Khambula had told him the leave was authorised, it appears to have been an entirely novel

allegation in the arbitration that Jalubane had also suggested he should take leave.

[22] On the face of it, there was no evidence to corroborate Bunda's claim that he was given permission to take leave. It is true the firm could have called Khambula to dispute Bunda's version Khambula had orally approved his leave, but it was not obliged to do so. The employer had produced prima facie evidence that Bunda's leave had not been approved and argued that the absence of completed leave forms confirmed that. Against this the arbitrator had to assess Bunda's uncorroborated evidence that he had been given oral permission by his supervisor to take the leave because the forms could not be found when he took leave. Bunda claimed he never did hand in the forms because he was handed the notice of the enquiry when he returned to work, but it does not follow why that precluded him from completing the forms. Logic dictates that the need to do so at that stage would have been

compelling as the charges would have alerted him to the importance of confirming the legitimacy of his absence. In the circumstances it cannot be said that the arbitrator was faced with two equally probable versions on the leave charge as he seemed to be saying. On the contrary, he could only have reached this finding by misconstruing the onus and ignoring the inherent weakness of Bunda's

claim that it was authorised.

[23] In parenthesis, it should be mentioned that it was argued by the firm that Bunda's evidence about Khambula giving him permission to go on leave was hearsay and should have been disregarded. However, that contention is wrong. It would certainly have immeasurably strengthened Bunda's version that Khambula had permitted him to go on leave without completing the leave forms, but Bunda was testifying that his foreman told him directly he could go on leave, not that someone else told him that Khambula said he could go.

[24] In the circumstances, the arbitrator's conclusion that Bunda's leave was authorised is not tenable on any reasonable evaluation of the facts. Had he not ignored material weaknesses in Bunda's version, he would have been compelled to find that his lengthy absence probably was unauthorised. Likewise, he would have had to have weighed up Bunda's failure to produce the laptop over two months and belated his concession that it was lost and that he pleaded guilty to the charge. It was only when he was charged that he offered to make recompense for it, whereas he must have known he had been called upon to return it in early October. Even if his belated offer to 'buy' the laptop could conceivably be seen as mitigating his action to some extent, it is unlikely that it would have been sufficient to make his dismissal inappropriate on that charge alone. However, when coupled with the lengthy period of unauthorised absence, without any corroboration of his illness by a medical practitioner, which by itself would justify dismissal, it is difficult to avoid the conclusion that the arbitrator's finding that dismissal was inappropriate was not one a reasonable arbitrator could have reached.

[25] Accordingly, the arbitrator's award should be set aside and his findings substituted. This is not a case which warrants the court making an order of costs.

Order

1. The arbitration award handed down by the Second Respondent under case number MPEM 1651-21 dated 11 July 2021 is reviewed and set aside.
2. The Second Respondent's findings that the Third Respondent (Mr M Bunda) was not guilty of unauthorized absenteeism and not guilty of misappropriation are substituted with a finding that he was guilty of both charges and his dismissal was substantively fair.
3. No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: JSL Nkosi instructed by Graham Attorneys For the Respondent: S Saunders instructed by LDA Inc. Attorneys

[1]

[2008] ZACC 15; 2009 (2) SA 204 (CC)

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