

SOUTH AFRICA / JUDGMENT

NSP Unsgaard (Pty) Ltd v Aziz and Others (C142/2020) [2023] ZALCCT 7 (30 March 2023)

[2023] ZALCCT 7

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C142/2020

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THE

LABOUR COURT OF SOUTH AFRICA,

HELD

AT CAPE TOWN

Case

No: C142/2020

Of

interest to other judges

In

the matter between:

NSP

UNSGAARD (PTY) LTD

Applicant

and

MAJID

AZIZ

First

Respondent

COMMISSION

FOR CONCILIATION, MEDIATION AND ARBITRATION

Second

Respondent

COMMISSIONER

WINNIE EVERETT (N.O.)

Third

Respondent

Date

of Set Down: 8 March 2023

Date
of Judgment: 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 10h00 on 30 March 2023

Summary: (Review – Fact based – Test
of review not satisfied – Costs – circumstances
warranting cost order)

JUDGMENT

LAGRANGE J

Background

- [1] In or about October 2018, Green Tissue, a family business situated in Bellville which produced a variety of paper tissue products was sold to the applicant company ('NSP'). As part of share purchase agreement, the applicant was intending to relocate the personal-care side of its business to the Bellville site and renovate those premises in line with its requirements and brand.
- [2] The first respondent, Mr M Aziz ('Majid') and two of his brothers, Messrs Zahier Aziz ('Zahier') and S Aziz ('Samad') who were part the Green Tissue management team, were employed by NSP on fixed term contracts to assist with the transition of the business. Zahier was employed as administration manager and Majid as operations manager for tissue operations. Both reported to Mr G Lemon, the general works manager for tissue operations. Majid's fixed term contracts was due to run from 1 November 2018 to 30 June 2020. He was dismissed on 2 October 2019 after being found guilty of two charges, which may be summarised as:

2.1 Removing company property from the premises himself or permitting others to do so without the necessary authorisation or agreement of any senior managers, or failing to apply measures to ensure that this did not happen.

2.2 Dereliction of duty for failing to apply himself in accordance with his overall responsibility as operations manager of the site in view of the unauthorised removal of the property.

- [3] The property in question consisted of a boardroom table and chairs, some kitchen equipment that was kept in a kitchen upstairs, an aerial picture of the company premises and a laptop computer.

- [4] It was common cause that, around mid-December 2018, Zahier removed a boardroom table and chairs from the boardroom adjacent to Majid's office, and they were taken off site. In addition, he removed a fridge, microwave and kettle. It was not disputed that he donated the items to a charity which collected them. An aerial photo of the business premises was also taken off the wall in Majid's office, but was not removed from the site.
- [5] Lemon had instructed Zahier to prepare the site for renovations and remove all old equipment and furniture. His understanding was that NSP would not be needing the items in question which were old and worn, because Lemon said the upgrade would be a complete one. Majid said he had the items removed and a charity came to collect them from the premises. This was not disputed.
- [6] Zahier temporarily replaced the old board room furniture with plastic chairs and the like. During a board meeting in April 2019, which Majid and Lemon were both attending, the managing director told Majid to find out from Zahier where the old furniture was. Majid got hold of Zahier on the phone. Zahier said that he had removed them on Lemon's instruction. Majid relayed Zahier's response to the board meeting. The present whereabouts of the items were not discussed. Majid was under the impression Zahier might have stored them elsewhere on the premises.
- [7] Zahier testified that if he had he been told this was not the intention earlier he could have retrieved them.
- [8] Majid only became personally aware the furniture had been removed from the board room, shortly before the shutdown, but had no knowledge where it had been taken. He was unaware even of the existence of the kitchen items which had been kept in a kitchen upstairs that he never entered.

The arbitrator's award

- [9] The arbitrator found the two charges related to the same act of alleged misconduct, namely that he failed to protect the company's assets by allowing them to be removed without the necessary authorization. She concluded that the only item Majid had personally removed from the site was his own daughter's laptop which was not part of the firm's assets. The aerial picture in question had been set aside in another office for a copy to be made and had not been removed from the premises.
- [10] The arbitrator decided that Majid could only have failed in a duty to protect company assets in the following circumstances:
- 10.1 he was responsible for the premises from which they were removed;
- 10.2 he knew the items were being, or had been, removed from the site, and
- 10.3 he had a reasonable explanation for not enquiring about their whereabouts.

- [11] The arbitrator accepted Majid was the most senior person on site, but that did not mean he had overall responsibility for all the assets on it. From the time the old business was transferred to the applicant, Lemon was in charge, and all the other managers on site reported to him. Lemon had in fact testified Zahier should have asked him, not Majid, about removing the items if he was unsure what he meant when he told Zahier to clear the area for painting and renovations. Accordingly, the arbitrator found Majid was not responsible for all assets on site but was expected to exercise care of assets in his area of responsibility, namely the factory, boardroom and his office.
- [12] The arbitrator found it was not disputed Majid was unaware of the contents of the kitchen and therefore would not have been known if they had been removed. He would have been aware of the removal of the boardroom table and chairs and the aerial photo because of his proximity to those items. He knew his brother had removed the photograph in preparation for the renovations but did not know where it had been taken. She noted that Lemon also assumed the boardroom furniture was being stored elsewhere on the premises and was not surprised by their absence. This commonly held assumption between Lemon and Majid was a reasonable one.
- [13] She found it was probable Zahier removed the furniture and had donated it to a charity because he reasonably understood that to be Lemon's instruction. The arbitrator believed the blame was shifted to Majid because his contract was only due to expire in April 2020, whereas Zahier's expired in April 2019.
- [14] She concluded Majid was not guilty of the misconduct and there was no reason for his dismissal. Accordingly, she awarded him compensation of seven months' pay, which was equivalent to the outstanding value of the remainder of his fixed term contract.

Grounds of Review

- [15] the applicant's grounds of review and evaluation thereof are set out below.

First Ground

- [16] Firstly, the applicant made some sweeping and generalised assertions about the award being irrational and the arbitrator committing irregularities and acting unreasonably. The sweeping contentions referred to above obviously do not bear consideration without specific reference to factual allegations underpinning them.
- [17] More specifically, the applicant contends that the arbitrator's decision to prefer the versions of Majid and Zahier to that of Lemon could not be justified. It argued that:

17.1 The arbitrator did so despite the fact that Majid's evidence was inconsistent and that it was inconceivable he would not have been aware of the removal of the furniture from the boardroom and the photograph from his office. The inconsistencies in question were that it was put to Applicant's witnesses that he Majid did not know who removed the furniture and had to contact his brother to find out, whereas in his own evidence in chief he agreed that he knew that

Zahier had removed them. It was put to applicant witnesses he said 'I will check with Zahier'. He claims he said that Zahier had removed it and when asked where it was said he would check with him.

17.2 The arbitrator ignored a so-called RAIL document which specifically assigned responsibility to Maji for the clearing of the boardroom/reception area, which he said he had done;

17.3 The arbitrator found that Lemon had instructed Zahier to remove the items from this site despite Lemon categorically denying this, and paradoxically held that Majid had a responsibility to exercise care of company assets in his area of responsibility which included the office and boardroom but irrationally absolved him of that responsibility when the items went missing.

[18] Majid retorted that irrespective of what the RAIL document contained, it was common cause that Lemon instructed Zahier to clear the boardroom area. Moreover, the arbitrator never concluded that Lemon had instructed Zahier to remove the items from the site. What she had in fact found was that Zahier had misunderstood Lemon's instruction to mean that he should dispose of the items. Majid correctly points out that, in any event, this had no direct bearing on whether he was guilty of misconduct in relation to the removal of the furniture.

[19] Insofar as there were some inconsistencies in Majid's version, the applicant fails to explain why those inconsistencies ought necessarily to have resulted in the arbitrator arriving at a different outcome on the probabilities. It was not unreasonable on the evidence for the arbitrator to have concluded that Majid was aware that the items had been removed from the boardroom but was not aware they had also been removed from the site.

[20] On a consideration of the evidence before the arbitrator, the inconsistencies between the version put to the applicant's witnesses of Majid's phone call to Zahier during the board meeting on 16 April 2019 are not as great as the applicant portrays, and are broadly consistent with a version that when it was asked what had happened to the furniture, in particular the boardroom table, Majid said he would ask Zahier. It was not suggested to the Applicant's witnesses that Majid said he did not know who had removed the furniture. It would have made no sense if he had said that, but at the same time said he would have to speak to Zahier. The fact that he immediately thought to speak to Zahier about the whereabouts of the furniture supports a version that he did not pretend to be unaware his brother was responsible for moving the furniture, even if he did not know he had also given it away. One of the applicant's supplementary grounds of review essentially traverses the same ground and suffers from the same weakness.

Second and Third Grounds

[21] The arbitrator found Majid knew that his brother, Zahier had removed the furniture whereas the arbitrator preferred his version that he had to enquire from his brother about the whereabouts of the furniture and how he did so was presented in two distinct versions. In the light of the arbitrator finding that Majid had a duty to exercise care of the assets in his area of responsibility it was improbable he would not have known what happened to those

items or alternatively that he should have sought authorisation to remove them from the site which he did not do.

- [22] I agree that what the evidence disclosed and which the arbitrator reasonably concluded was that Majid was aware of the furniture been removed, but had no knowledge of whether or not it had left the premises. In fact, in common with Lemon he had assumed it had simply been relocated elsewhere on the premises. As such, it is difficult to see how the arbitrator could be faulted for finding that Majid was unaware that the furniture had not only be removed from the boardroom but from the premises itself.
- [23] The applicant also contended that it was nonsensical of the arbitrator to It was nonsensical to raise the issue of his daughter's laptop and he had in fact testified to removing the aerial picture from his office but in his evidence in chief claimed he did not know who had taken in it and had found out later that Samad had. It was noted that he claimed the laptop was his daughter's then said it was broken. The applicant also contends that Majid did not provide the best evidence of his daughter's ownership of the laptop as he should have and the arbitrator failed to appreciate this.
- [24] The arbitrator's own finding on the issue of the laptop is set out in paragraph 39 of her reward. In essence she accepted Majid's account that it was his daughter's and was not part of the assets listed in the asset register compiled for the transfer of the business. Moreover, he removed it from his office before the business was transferred.
- [25] In the context of a query in the April boardroom meeting about items that had been removed from the premises, there was no reason for Majid's remark that he had removed his daughter's laptop to be considered an entirely unnatural response. Moreover, Majid was not challenged on whether the laptop belonged to the applicant or his daughter, so it is unclear why he would have needed to lead further evidence on this issue. Equally, an adverse inference did not have to be drawn against Majid when he claimed that the laptop was also broken.
- [26] In relation to the alleged discrepancy between Majid's evidence about whether he had removed the aerial photograph from his office, or that it had been removed by someone else, the versions of Lemon and Van Wyk about what Majid said at the meeting on 16 April not reconcilable. Van Wyk claimed that Majid said he had taken it home because it was an item of sentimental value. By contrast, Lemon testified that Majid had said he was not certain where to been taken. It was common cause that it was later found in the office of his other brother Samad. On the evidence available, it cannot be said that the arbitrator's conclusion that it probably had not in fact been removed from the premises cannot be said to be one that no reasonable arbitrator could have arrived at.

Fourth Ground

- [27] The applicant appears to argue that the arbitrator should have realised that the applicant was simply seeking to place all blame on Zahier who had already left the applicant's employment.
- [28] In fact, the arbitrator did take account of the fact that said they had already left the applicant's employment, but drew a completely different inference from that. She concluded that it was because he had left that the applicant had tried to shift the blame for removing items from the premises onto Majid. However, whether or not this was in fact the case, has little bearing on the critical findings of the arbitrator and the issue whether or not Majid was guilty of the charges.
- [29] The applicant further contends that arbitrator's conclusion that Majid was not guilty of dereliction of duty of his function as operations manager was not reasonable in circumstances where he had acknowledged items could not be removed without authorisation, and as the most senior person on site was expected to take care of asset in his area of responsibility which included the furniture and photo. This criticism seems to collapse different strands of reasoning. There is nothing inconsistent between acknowledging the existence of a duty to take care of assets and that they should not be removed from the premises without authority, yet maintaining that one did not know that assets were going to be, or had actually been removed from the premises. This is all the more so in the context of a major refurbishment of the premises taking place which required items to be moved from their existing locations. Once again, the reasonableness of the arbitrators finding about whether Majid had been derelict in his duties with respect to the applicant's assets also took place in the context of a situation in which the person who was responsible for authorising the removal of assets from the premises, had also not been alarmed that the boardroom furniture was no longer in the boardroom after December 2019 because he assumed it had been moved elsewhere in the premises.

Supplementary grounds

- [30] Aside from referring to selected extracts from the transcript, the supplementary grounds of review do not add anything of substance to the grounds addressed above.

Conclusion

- [31] The applicant has approached this review more along the lines of an appeal. In *Head of Department of Education v Mofokeng & Others*

(2015) 36 ILJ 2802 (LAC), the Labour Appeal Court stated:

"[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide

a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting

effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination

of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must

then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

(emphasis added-footnotes omitted)

[32] In a similar vein, the LAC has criticised review applications which focus on detailed aspects of evidence without revealing that the findings under attack result reveal fundamental flaws of such a nature that the arbitrator’s findings could not be supported on any plausible interpretation of the evidence:

“[18] In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.” [1]

(Emphasis added)

[33] Even if it is possible that another arbitrator or a court might have come to a different conclusion on some of the arbitrator’s findings, I am satisfied that the criticisms raised as grounds of review by the applicant are either ill founded or, even if they might be partially correct, such weaknesses are not of a nature that they would necessitate a conclusion that the principal findings of the arbitrator are unsustainable on the evidence that was before her.

[34] Both parties sought a cost award if they were successful. Majid already had an award in his favour, which he had good reason on the merits to defend. The grounds of review raised were weak, at best. Arbitration proceedings are intended to be the primary forum for deciding dismissal disputes of this nature^[2] and disgruntled parties should not initiate review proceedings just because the award was not to their liking and that review proceedings

are an avenue open to them, irrespective of the merits or a review.

[35] The applicant has persisted in defending the dismissal in a case in which cogent evidence of a major component of the charges against Majid was lacking, namely his knowledge of items actually being removed from the premises. It also has done so knowing that the authority for items being removed from the premises did not even lie with Majid. Further, it was never explained what it was that Majid actually culpably failed to do to prevent the items being removed, which amounted to a dereliction of duty.

[36] Under these circumstances, there are good reasons in law and fairness to make an appropriate cost award.

Order

[1] The review application is dismissed.

[2] The Applicant must pay half of the First Respondent's costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives For the Applicant R Matsala instructed by Jafta Inc. For the First Respondent C de Kock instructed by Dixon Attorneys

[1] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others

(2014) 35 ILJ 943 (LAC) 2014 ILJ

[2] Shezi v SA Police Service & others

(2021) 42 ILJ 184 (LC) at paras [21] –[22]. See also Explanatory Memorandum on the Draft LRA Bill, Chapter VI The Regulation and Adjudication of Unfair Dismissal, published under Notice 97, GG No. 16259, 10 February 1995

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