

SOUTH AFRICA / JUDGMENT

Prowalko v Commission for Conciliation Mediation and Arbitration and Others (P608/09) [2011] ZALCPE 3 (5 April 2011) [2011] ZALCPE 3

COURT

Labour Court Port Elizabeth

BEFORE

Molahlehi

CASE / FILE NUMBER

P608/09

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IN THE LABOUR
COURT OF SOUTH AFRICA
HELD AT PORT
ELIZABETH
CASE
NO.-P608/09
In the matter

between:

PROWALCO
(PTY) LTD
.....Applicant
And
COMMISSION
FOR CONCILIATION
MEDIATION &
ARBITRATION
.....1st
Respondent
MARIS KOTZE
N.O
.....2nd
Respondent
LOUISE SERRAO
.....3rd
Respondent

JUDGMENT

MOLAHLEHI J

INTRODUCTION

The applicant in this matter seeks an order reviewing and setting aside the arbitration award issued by the second respondent (the commissioner) under case no: ECPE 2555-09 dated 16th November 2009. In terms of that arbitration award the commissioner found the dismissal of the third respondent, who will in this

judgment be referred to as the “employee,” to have been unfair.

Background facts

The employee, Ms Serrao who was employed as a regional maintenance co-ordinator by the applicant was amongst others responsible for co-ordinating subcontractors engaged in repairing damaged structures and to conduct maintenance in respect of petrol stations with which the applicant had contracts with was dismissed for misconduct.

It is standard practice that subcontractors who do work for the applicant are issued job cards prior to commencement of their work. The purpose of the job cards is to instruct the contractors as to the specific mandate they ought to perform. In terms of the policy of the applicant contractors are not permitted to be on site if not in possession of a job card.

The compliance with the above policy became even more critical after apparently an incident which occurred in Pakistan. After that incident and on the 23rd of March 2009, a “stand down” meeting was convened with all the contractors. The discussions during that meeting focussed on the issues of safety. The other aspect which was emphasised which was part of the safety measures was that all the contractors should ensure that permit issuers were on site at all times when high risk repair or maintenance was being performed.

During that meeting Mr Strydom, representing, Infrastructure Steel Work CC, indicated the difficulty he had with that policy, namely that he did not have enough permit issuers who would be on site as required. In response thereto the employee undertook to raise the issue with the main contractor and thereafter revert back to him. It seems common cause that the employee did not revert back to Mr Strydom who in turn assumed that the rule would apply in a flexible manner.

Prior to the ‘stand down’ meeting, the employee sent an email to Mr Strydom informing him of the need to make the canopy safe. A job card had been issued for that particular task which was carried out during March 2009. That task was completed on 17th March 2009 and the job card thereof records the following:

“[s]ecure 6 loose roof sheets and remove 8 roof sheets which would not be secured due to corrosion in that area. Temporarily secured light to purlin.”

After the completion of the work done by Mr Strydom, other problems remained that required attention. In this regard the employee requested Mr Strydom to provide a quotation for the replacement of the canopy. On receipt of the quotation the employee forwarded the same to the business consultant.

The version of the employee during the arbitration hearing was that she did not hear from Mr Strydom until the incident in which his employee was injured on site. It would appear the work which Mr Strydom was performing when the incident occurred was still to be approved and no business card had been issued.

The investigation conducted by the applicant, the report of which was submitted during the arbitration hearing, revealed that the cause of the accident was that the employee of Mr Strydom had fallen 4.5 metres because he did not properly attach his fall system. Arising from that incident the employee was charged with the offence which is summarised by the commissioner in the arbitration award in the following terms:

“Failure to adhere to minimum standards required with serious consequence to the employer and the customer.

During the safety stand down meeting of 23 March and the Algoa Bus incident it is felt that Louise Serrao was negligent in carrying out the minimum expectations of Prowalco as per job description:

Jobs in progress until completion:

ensure contractor works in accordance with technical spec's and complies with the environmental health and safety requirements.

knowledge and application of technical spec's and environmental health and safety requirements.

ensure that you fully understand these requirements and clarify when in doubt.”

The employee was found guilty and dismissed. The chairperson of the disciplinary hearing in imposing the sanction of dismissal had the following to say:

“... the employer and the customer relationship might have been broken or because of the incident is a little bit broken or is broken. This will result in me having to apply the sanction that has been put down in our disciplinary code of conduct which is dismissal for the first offence. So my sanction will be, it is dismissal. So it is dismissal.”

Grounds for review

The grounds upon which the applicant relies on in challenging the arbitration award of the commissioner can be summarised as follows:

The commissioner failed to apply his mind to the facts in evidence before him.

The commissioner failed to appreciate the nature of the evidence presented before him thus leading to an unreasonable decision.

The commissioner exceeded his powers by drawing conclusions which were not supported by evidence.

The commissioner failed to take into account the evidence tendered by the applicant.

The commissioner's award

The commissioner in his arbitration award rejects first the complaint of the employee that the dismissal was motivated by the attitude which the chairperson of the disciplinary hearing had against her regarding the outcome of disciplinary hearings that she (the employee) had been involved in. The complaint was based on the comment made by the chairperson of the disciplinary hearing during one of the breaks at the hearing.

As concerning the facts of the case the commissioner found that it was common cause that Mr Strydom's close corporation (the CC) was instructed during March 2009 to make safe the danger presented by the loose roof sheets at Algoa bus site. On completion of that work Mr Strydom sent an email to the employee informing her that the problem was more than just removing the roof sheeting. It was on the basis of this that the employee requested Mr Strydom to submit a quotation for further work that he said was required.

The commissioner further found that after the communication with Mr Strydom, the employee contacted Chevron to enquire as to whether Mr Strydom should proceed with the job. In analysing the emails exchange between the employee, Mr Strydom and Chevron the commissioner found that Chevron had intended to authorise Mr Strydom to do the work but relevant paper work still needed to be completed. The commissioner found further that the employee did advise the applicant what the stand of Chevron was in relation to the work. The employee informed Mr Strydom that she was still awaiting the approval from Chevron but that in the mean time he should proceed to make safe the canopy.

The commissioner then proceeds to consider whether or not the instruction to make canopy safe meant that Mr Strydom had the mandate to continue with work beyond what was set out in the job card of the 17 March 2009. Based on the concession made by Mr Strydom during cross examination the commissioner found that making the canopy safe was confined to the job card of the 17 March 2009. The commissioner further found that the version of the employee that she informed Mr Strydom at the meeting of the 23rd March 2009 that he would be issued with another job card once approval for the job was received was not challenged.

As concerning the work done on the 2 April 2009 the commissioner found that, Mr Strydom was aware that he had to contact the employee before going onto the site and further he was aware that the Service Operational Procedure provided that he could not do work on site without a job card. Mr Strydom was also aware that the work he was doing had not been approved and was aware also that a certificate holder had to be on site when work at heights was done and that was not negotiable as was confirmed by the employee at the meeting of 23rd March 2009.

Taking the above into account the commissioner found that Mr Strydom despite being aware of the policy flagrantly disregarded the requirements thereof. The essence of the finding is that the employee was not to blame for what happened and that the full blame had to be on Mr Strydom.

Evaluation

It is trite that the enquiry to be conducted in considering whether or not the commissioner's arbitration award should be interfered with is, whether or not the decision or finding reached by the commissioner is one which a reasonable decision maker could not reach. If it is an arbitration award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable and thus reviewable and subject to being set aside.

The reasonableness or otherwise of the arbitration award has to be assessed not in vacuity but rather on the facts and circumstances of a given case. In other words in assessing the reasonableness of an arbitration award the court has to contextualise the reasoning and the conclusion reached by the commissioner with the facts, the circumstances and any other materials which were properly placed before him or her. In this regard the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at paragraphs 78 to 79, held that:

"[78] In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

In *Fidelity Cash Management Services c CCMA and others* [2008] 3 BLLR 197 (LAC), the Labour Appeal Court summarised what is required of commissioners in making their decisions in arbitrations awards as follows:

“[94] In terms of the Sidumo judgment, supra, the commissioner must:

“take into account the totality of circumstances” (paragraph 78);

- (b) “consider the importance of the rule that had been breached” (paragraph 78);
- (c) “consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal” (paragraph 78);
- (d) “consider the harm caused by the employee’s conduct” (paragraph 78);
- (e) “consider whether additional training and instruction may result in the employee not repeating the misconduct”;
- (f) “consider the effect of dismissal on the employee” (paragraph 78); and
- (g) “consider the employee’s service record”.

The Court went further to say:

“[95] Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was, in all of the circumstances, a fair sanction in such a case. In answering that question, he or she would have to use this or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.”

In applying the above test to the present case there is no doubt that the commissioner cannot be faulted for unreasonableness. The commissioner in arriving at the decision that the dismissal was unfair firstly set out the background facts in details, which was not disputed by the respondent, and thereafter reasoned his conclusion in a manner that it cannot be disputed that there is a rational connection to the reasoning and the conclusion. The context in which the dismissal and the reason thereof occurred is fully analysed by the commissioner. It is thus clear that the commissioner was largely influenced by the circumstances and the context in which the dismissal occurred. The dismissal occurred in the context where the employee could not be blamed for not complying with the rules but everything occurred because of the flagrant disregard of the applicant’s rules by Mr Strydom.

The job card for which the applicant seems to have relied on in charging and dismissing the employee have no relation to the failure by Mr Strydom’s employee to comply with safety measures. The purpose of the job card is to authorise the contractor to do the work and a means through which payment for the work done can be claimed. The job card also describes the work to be done by the contractor. The version of the employee that Mr Strydom was told not to proceed with the job until a job card was issued was not challenged by the applicant.

It would appear that Mr Strydom commenced with the work in anticipation that he would be getting the job. It would also appear that Cheveron had intended approving the appointment of Mr Strydom's CC to do the job and accepted his quotation. The fact of the matter is however that the appointment to do the job was still pending when he moved into the site.

There is also, from the reading of the record, no evidence that there is a rule of the applicant that says failure to issue a job card is an offence that could lead to dismissal. Even assuming that that was the case, the applicant's case would still on the authority of *Edcon Ltd v Pillemer NO and others* [2010] 1 BLLR 1 (SCA), have been unsustainable because, in addition to what is stated earlier, there is no evidence that suggest a breakdown in the

relationship between the employee and the applicant. See also *Westernaria Local Municipality v SALGBC* [2010] 3 BLLR 342(LC). The reasoning in the *Edcon* is that the employer has the duty to adduce evidence to show that the relationship has broken down because of the offence committed by the employee.

In my view, there would still be no basis for interfering with the decision of the commissioner even if it was, for whatever reason, to be found that the dismissal was substantively fair. The dismissal would have been unfair because the facts and the circumstances before the commissioner indicates very clearly that a dismissal sanction would have been unfair. The sanction of dismissal would have been unfair taking into account a number of factors. One of those factors relate to the point made about the fact that there was no evidence of breakdown in the relationship. That the relationship did not breakdown is evinced by even the closing remarks made by the initiator of the disciplinary inquiry. The concern of the initiator of the disciplinary hearing was mainly about avoiding the repeat of such incidents in the future. The incident according to him had affected the relationship between the applicant and Chevron. This is the point which the initiator emphasised. There is no reference made to what impact the incident had on the relationship between the applicant and the employee.

The earlier quotation from the decision of the chairperson of the disciplinary hearing also indicates that the problem that arose as a result of the incident was between Chevron and the applicant. The chairperson of the disciplinary hearing made no finding as concerning the impact that the incident had on the relationship between the employee and the applicant. It is also important to note that the investigation report into the cause of the incident did not implicate the employee. The investigation report found that the possible cause of the incident was:

"3.1 Stepping on fragile roof (sheets with gutters fall down), purling very rusted. The Permit Issuer also advised workers that it would be safe to step on the sheets in close proximity of the fascia. This could give wrong impression to workers and no stepping on ceiling sheets should be allowed on a canopy."

Fall arrest was not tide down at minimum one point during movement of position."

The report concludes that the fall of the employee of Mr Strydom could have been avoided if the fall arrest was properly secured on a steel beam. And more importantly the report states that all documents must be properly completed and signed by all the parties and the risk communicated

to all involved before a job is performed. It is clear from the above that Mr Strydom, who had assumed that his company would be appointed to do the job, started the task without the necessary documentation. In his evidence he does not suggest that he was authorised to do so by the employee, - he did so on his own accord.

In addition to the above discussion it is important to note that this matter revolved largely around the question of the factual findings made by the commissioner. The question of factual findings in dismissal cases are determined primarily by the arbitrating commissioner of the CCMA or bargaining council as the case may be, rather than by the court considering the review application. In the absence of material error of fact the findings of a commissioner are to be respected by the court even if the court was to find that the dispute may be resolved one way rather than another. In other words, as has been stated previously in our labour jurisprudence it is not for the court to substitute its decision for that of the commissioner.

The court is in my view, without authority to interfere with the factual findings made by the commissioner if such findings are support by evidence on the record. The authority of the court is highly limited in reviewing the fact findings made by the commissioner in an arbitration award. If the factual findings made by the commissioner are prima facie lawful and reasonable, it seems to me that the court has to defer to the commissioner's factual findings. The court may only interfere in a case involving a mistake of fact where it has been shown that such a mistake is of such a nature that it can be said that it amounted to a denial of a fair hearing for the applicant.

As a matter of principle the court's province in dealing with factual findings of a commissioner is limited to determining whether such findings can be sustained or supported by evidence on the record. Put differently, the factual findings made by the commissioner in an arbitration award is final and binding on the reviewing court unless it can be shown that:

there is insufficient evidence on the record to support such findings or

the findings were erroneously made and the error is of such a nature that it in a material manner deprived the affected party a fair hearing or

the findings appear to be unreasonable, capricious or arbitrary or

the findings are based on evidence which had inherent contradiction which the commissioner failed to reconcile and deal with.

The commissioner made the findings without resolving the material contradictions that existed in the different versions between the parties or even those that are present in the version of the winning party.

In the present instance the commissioner as indicated earlier in this judgment applied his mind to the evidence which was presented before him and after properly evaluating it made the factual findings as he did. The findings made by the commissioner are not mistakenly made, are reasonable and supported by the evidence which was properly before him.

In my view, there is no basis in the light of the above to interfere with the commissioner's arbitration award and therefore the applicant's application stands to fail. There is also no reason in law and fairness why the costs should not follow the results.

In the premises the applicant's application is dismissed with costs.

Molahlehi J

Judge of the Labour Court of South Africa

Date of Hearing: 25 November 2011

Date of Judgment : 05 April 2011

Appearances

For the Applicant : Ms G Ndlovu of Maserumule Inc

For the Respondent: Adv Wade S.C instructed by Kaplan Blumber Inc.

9

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