

SOUTH AFRICA / JUDGMENT

Royappen v Statutory Council for the Printing Newspaper and Packaging Industry and Others (D576/06) [2011] ZALCD 19 (14 January 2011)

[2011] ZALCD 19

COURT
Labour Court DurbanBEFORE
GushCASE / FILE NUMBER
D576/06

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IN THE LABOUR COURT OF
SOUTH AFRICA
HELD IN DURBAN
Case No. D576/06
Not Reportable

In the matter between: PHILLIP ROYAPPEN
.....Applicant
And
STATUTORY COUNCIL FOR
THE PRINTING
NEWSPAPER AND
PACKAGING INDUSTRY
.....1st
Respondent
COMMISSION FOR
CONCILIATION MEDIATION
AND ARBITRATION
.....2nd
Respondent
DEAN ISAACS N. O.
.....3rd
Respondent
CORRUSEAL CORRUGATED
KZN (PTY) LTD
.....4th
Respondent

JUDGMENT

Gush J

The applicant was dismissed by the 4th respondent following a disciplinary enquiry at which enquiry the applicant was accused and found guilty of “Theft of a fellow employee’s property or alternatively misappropriation of a fellow employee’s property”.

The applicant referred his dismissal to the 1st respondent who appointed the 3rd respondent to arbitrate the dispute. At the conclusion of the arbitration the 3rd respondent made the following award:

2.1. “The application fails.

2.2. The Applicant’s dismissal is substantively fair.

2.3. There is no order as to costs”

It is this award that the applicant applies to have reviewed and set aside.

The background to the dispute was as follows:

4.1. The applicant was employed by the 4th respondent as a dispatch coordinator;

4.2. At the time of the incident, the 17th February 2006 (a Friday), the applicant was working night shift;

4.3. Towards the end of his shift the applicant went to the 4th respondent’s administration offices where he removed a folder containing pens and notes belonging to another employee from her desk. The applicant took the folder placed and it out of sight of the security camera and returned later with his bag, placed the folder in his bag and took it home.

4.4. On the Monday the employee who worked in the office and to whom the folder belonged discovered that her folder which she had left on her desk was missing. She sent out an email on the 4th respondent’s intranet to which all employees had access asking whether anyone had seen her folder which contained two pens, (one of which had sentimental value as it was a pen presented to her by her former colleagues when she had left her previous employment) and various documents including an email addressed to her. There had been no response to the email and she had requested the assistance of a colleague Mr. Vawda.

4.5. The office was equipped with a surveillance camera and Mr. Vawda obtained the video footage of the office for the relevant period including the night shift on the 17th February. When he viewed the tape the footage revealed the applicant walking around the offices, picking up the folder zipping it closed and proceeding to an area out of view of the camera. The applicant thereafter reappeared and returned into view but without the folder. The tape then showed the applicant later returning to the office carrying his bag. The applicant again moved to the area out

of view of the camera and when he reappeared he had his bag on his back. The applicant looked around the office and left.

4.6. As a result Vawda called the applicant and asked him if he had any knowledge of the folder and its disappearance. The applicant initially denied any knowledge of the disappearance of the folder and the email that had been sent out regarding its disappearance. However when confronted with the video recording the applicant admitted that he had removed the folder.

4.7. The applicant's explanation was that he had removed the folder in order to teach a Mr. Lander, who worked in the administration office, a lesson. The applicant told the 4th respondent that he believed that Lander was negligent in leaving his folder on the desk and not locking it away and therefore he had removed it.

4.8. On the Wednesday, the 22nd February, the applicant who had still not returned the folder fetched it from his home and returned the folder to the 4th respondent's premises. He blamed his son for not returning it sooner alleging that his son had removed the folder from his bag.

4.9. The applicant was charged with "Theft of a fellow employee's property or alternatively misappropriation of a fellow employee's property" found guilty and was dismissed. The applicant availed himself of the 4th respondent's appeal process but his appeal was unsuccessful.

4.10. The applicant referred his dismissal to the 1st respondent who appointed the 3rd respondent to arbitrate the dispute

Mr. Haralambous, who appeared for the applicant, confined the applicant's grounds of review to the allegation that the 3rd respondent was guilty of committing a gross irregularity in the conduct of the arbitration proceedings and/or misconducted himself in relation to his duties as an arbitrator¹ in that the 3rd respondent had:

5.1. Prior to the arbitration had told the applicant in private that since he, the applicant, did not have his witnesses present that he would not be able to call them and may not even refer to them in his evidence; and

5.2. Failed to properly assist the applicant (who was unrepresented) during the arbitration specifically that the 3rd respondent should have subpoenaed the applicant's witnesses or advised him that he could subpoena witnesses if they were not present.

Mr. Haralambous correctly conceded that save for the above averments the 3rd respondent's award was not reviewable. The award and the record clearly shows that the decision of the 3rd respondent was one that a reasonable decision maker could come to based on the evidence before him. The question therefore was whether the 3rd respondent in fact told the applicant in private that as his witnesses were not present he could not call them and may not even refer to them in his evidence and whether such conduct coupled with the 3rd respondent's failure to advise the applicant of his right to subpoena witnesses/ subpoena them himself amounted to a gross irregularity and misconduct justifying the setting aside of the award.²

Both parties referred to a number of cases dealing with the duties of an arbitrator when faced with an unrepresented party and the extent to which an arbitrator is obliged to assist the parties.³ A common thread which runs through these cases is that in each instance it is the specific circumstances of each matter that determines the extent to which the arbitrator is required to come to the assistance of a party to the arbitration.

In this matter the applicant relies on two grounds of review pertaining to the averred misconduct. The first is the suggestion that the 3rd respondent privately advised the applicant that he was not entitled to call his witnesses as they were not present and that he could not call them he may not even refer to them. The second ground is dependant upon the applicant having established that the 3rd respondent in fact so advised him. If the 3rd respondent was not made aware of the applicants desire to call witnesses he could not be expected to either to assist the applicant by telling him of his right to subpoena witnesses or in deed to subpoena them himself.

The record of the arbitration in no way suggests that the applicant indicated that he had witnesses that he wished to call and that they were not present or that the 3rd respondent in any prevented the applicant from calling witnesses.

In order to succeed the applicant therefore the applicant is required to establish on a balance of probabilities that the 3rd respondent committed the conduct of which he complains.

As the so-called misconduct, which the applicant avers the 3rd respondent is guilty of, took place in private it is necessary therefore in determining whether on a balance of probabilities the 3rd respondent committed the misconduct of which the applicant accuses him, to consider the circumstances surrounding the applicants

conduct and his actions at the time of and immediately after the arbitration.

The applicant's explanation of his conduct on the night of the 17th February 2006 and thereafter is so improbable that it defies belief. Inter alia, the applicant admits having removed the folder in the circumstances shown in the security video footage and suggests that he picked up a folder on a desk in the administration office, which he then zipped up and removed it as a prank on a colleague. He does not offer any explanation why he didn't check to see whether in did in fact belong to his colleague and why it was necessary to surreptitiously remove the folder if this was merely a prank and why he did not simply take the folder with him when he left the office the first time. It was only when confronted with the video evidence that he confessed. He explained that he intended to return the folder on the Monday but blamed his son for not doing so by suggesting that his son removed the folder from his bag.

In support of his averment that the 3rd respondent prevented him from leading evidence, the applicant refers in his affidavit to the 3rd respondent's award where the 3rd respondents records that the applicant failed to lead evidence of Lander in support of his "contention" that it had all been a prank, and makes the averment that he had specifically told the 3rd respondent before the commencement of the arbitration that Lander "was a potential witness"

However this averment must be considered in the light of a detailed letter the applicant included in his bundle of documents. This letter, which he faxed to the 1st respondent, purports to be a "Grievance against award on case no. PNPI 160 (Phillip Colin Royappen and Corruseal) (sic). This document which Mr. Haralambous confirmed was drafted by the applicant was received by the 1st respondent on the 21st July 2006. The arbitration award is dated the 10th July 2006 and was received by the applicant on the 18th July 2006.

In this document the applicant recorded in detail his concerns regarding the conduct of the arbitration. In particular the applicant specifically recorded what transpired during the attempt by the 3rd respondent to conciliate the matter which was when the 3rd respondent is alleged to have committed the misconduct. Conspicuous by its absence is any mention whatsoever of any discussion of witnesses which the applicant wanted to call, or who were not present. In fact nowhere in this document which was obviously

carefully prepared (and contains references to decided cases) does the applicant refer to any witnesses he wished to call or any conduct by the 3rd respondent regarding his witnesses which he found to be unacceptable.

Weighing up the probabilities it is highly improbable that the 3rd respondent would have specifically advised the applicant that as his witnesses were not present that he could therefore not secure their attendance, may not call them and would not be allowed to even refer to them and then refer in his award to his failure to call his witnesses as one of his grounds for dismissing his application.

Given that there is no reference in the award or record to any witnesses that the applicant wanted to call or any suggestion that they were not present or that he was prevented from calling them it is altogether too convenient that the applicant avers that he was advised by the 3rd respondent in private that he may not even refer to his witnesses.

I am not satisfied that the applicant has established on a balance of probabilities that the 3rd respondent was guilty committing misconduct in relation to his duties nor that he committed a gross irregularity in the conduct of the arbitration.

I accordingly dismiss the applicant's application with costs.

GUSH J

Date of hearing : 11th November 2010

Date of judgment : 14th January 2011

APPEARANCES

For the Applicant : Mr. Haralambous of Haralambous Attorneys

For the 4th Respondent : Mr. Forster of Forster Attorneys

1s145(2)(a)(i) and (ii) of the Labour Relations Act 66 of 1995

2Section 145(2) of the Labour Relations Act 66 of 1995.

3Bafokeng Rasimone Platinum Mine v CCMA and others JR1734/03 (unreported); Dhlamini and others v Faraday Wholesale Meat Supply

[1999] 8 BLLR 771 (LC); Scholtz v Maseko NO & others [2000] 9 BLLR 1111 (LC); Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naikjer & others [1997] 12 BLLR 1632 (LC) Sasko (Pty) Ltd v Buthelezi & others [1997] 12 BLLR 1639 (LC); and A A Ball (Pty) Ltd v Kolisi & another [1998] 6 BLLR 560 (LC).

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