IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR2847/17

In the matter between:

AWA WATER MANAGEMENT (PTY) LTD	**Applicant**
and	
MICHELE RADOCCIA	**First Respondent**
MICHAEL MARAWU *NO*.	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Enrolled: 27 May 2020, and further submissions via Zoom on 04 September 2020.

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives by email, and release to this Court's library and SAFLII. The date and time for hand-down is deemed to be 10:00 on 11 September 2020.

JUDGMENT

Mabaso, AJ

Introduction

[1] The learned Savage AJA,[1] in *County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers' Union and Others*[2] reminded us about the role of an arbitrator in resolving disputes, as that Court held thus,

> *"As was stated in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others in determining whether a dismissal is fair or not does the decision-maker 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". Deciding this does not require the decision-maker " …to defer to the decision of the employer.* ***What is required is that he or she must consider all relevant circumstances****."*[3]

[2] The Applicant is Awa Water Management (Pty) Ltd (the Applicant), the First Respondent is Michele Radoccia (the employee), the Second Respondent is a Commissioner of the CCMA (the arbitrator) and the Third Respondent is the Commission for Conciliation Mediation and Arbitration (the CCMA). Only the employee is opposing this application.

[3] The Applicant seeks an order to review and set aside an arbitration award issued by the arbitrator under the auspices of the CCMA under case number GAJB 5088/2017(the award).

Some of the relevant background

[4] Before the arbitrator, it was common cause that, on 14 September 2016, the employee was found guilty of fraud, dishonesty, resistance to authority, and

[1] Writing for the Court.
[2] [2018] 8 BLLR 756 (LAC).
[3] Ibid, para 27. Own emphasis. Footnotes omitted.

reckless driving. As a result, he was issued with a final written warning, valid for 12 months (the warning).[4]

[5] Before the expiry of the warning, the employee was summoned before another disciplinary hearing wherein he was charged and found guilty of four counts of misconduct; namely gross insubordination and gross dishonesty, late coming and dangerous and reckless driving in that he drove the Applicant's vehicle on excessive speed limits.[5]

[6] Relating to first charge, the allegations against the employee were *inter alia* that on the morning of 20 February 2017 he was told by the director of the applicant (Mr Vogel) to wait for him outside the office in order to engage about an incident of insubordination. However, the employee decided to leave the premises of the applicant without permission and went home using the Applicant's vehicle (hereinafter referred to as count 3 of first charge).[6]

[7] The Applicant through Mr Vogel, in support of this charge, presented the following evidence: The employee became very loud and defensive; as a result, he told him to "*please take a chill pill. Sit down, and [he] will call [him*]."[7] The arbitrator, in the award, states that Mr Vogel testified that he asked the employee to wait "outside the office" while preparing necessary documents in respect of the allegations of failing to clean the Applicant's bakkie (the bakkie). However, the employee left the premises without authorisation.[8]

[8] Later, Mr Vogel noticed the employee driving out of the premises with the bakkie. He tried to phone him on his cell phone, but it was off. Then he checked the tracker which indicated that he was on the freeway presumably going home. He then SMSed the employee saying,

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[4] Records, Vol 1 (Vol 1), p 56. Pleadings, p 21, para 10; p 61 – 62.
[5] Pleadings, p 9, para 18 and answering affidavit, p 57, para 33.

[6] P 376.
[7] Vol 1, p 38 -39.
[8] Pleadings, p 21, para 9

> *"**Please note that I ask you to wait** whilst I prepare some documentation regarding your conduct. **You have now left the premises in the company's vehicle unauthorised** and **I demand that you return the vehicle by 8:30**, failing which I will lay a charge of theft against you. This is an instruction."*[9]

[9] The employee, an hour later, responded by saying *"Clearly that was not the case otherwise I will be waiting. Not theft. You know exactly where the bakkie is."*[10] On the following day, Mr Vogel sent another SMS to the employee advising him that he withdrew his services from the applicant; as a result, Mr Vogel had to collect the bakkie from him so that it could be used to complete the day's work as he had refused to return it. Again, the employee was begged to return to work. The employee responded by SMS, too, and said: "*Thanks, considering the bad weather is it possible to come back on Thursday."*[11]

[10] The arbitrator under in the award states that the employee testified that he was advised to go home and wait for a notice to attend the disciplinary hearing when he was told that he must "take a chill pill."

Grounds of the review application

[11] The applicant, inter alia, contends that the arbitrator committed reviewable irregularity, its grounds of review are as summarised hereinafter.

[12] That the arbitrator misdirected himself in that he did not give the applicant a fair trial of issues as in the award, he accepted the evidence of the employee, despite such evidence not been put to the witnesses of the applicant.[12] Furthermore, he failed to deal with the adversity of the employee's evidence,

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[9] Vol 1, p 40, p 173d, para 5; Records Vol 2 (Vol 2), p 404. Own emphasis
[10] Vol 2, p 404.
[11] Ibid.
[12] The founding affidavit, paras 23 to 27,30, supplementary affidavit para 7,8

his credibility, and the probabilities specifically the majority of the version presented by the employee were not put Mr Vogel.[13]

[14] As the arbitrator ordered the Applicant to pay the employee a compensation, according to the Applicant, this is more like a punitive compensation considering that the employee's misconduct, guilty verdict,[14] and he failed to take into account that the employee was on a final written warning.[15]

[15] The charges that he was found guilty of warranted the sanction of dismissal.[16]

[16] That the arbitrator failed to deal with crucial issues, in that there was evidence regarding insubordination but did not make a determination in respect of that count 3 of first charge, in that on the morning of 20 February 2017 the employee left the premises of the applicant without permission. Furthermore, he failed to mention this count in his analysis.[17]

[17] I must mention that I have considered the grounds of review relating to the not guilty findings in the second charge[18]and gross insubordination charge relating to failure to clean the bakkie,[19] but I cannot entirely agree with the arbitrator's conclusion thereof, however, I cannot overturn those findings based on the fact that I would have reached a different conclusion taking into account that this is a reviewing court, not an appeal court.

Principles and application thereof

[18] In *CUSA v Tao Ying Metal Industries &Others*,[20] the Constitutional Court held that arbitrators are given a measure of latitude in deciding disputes before

[13] The founding affidavit, p 16, para 44. the supplementary affidavit, p 34, para 7.

[14] Ibid, p 16, para 46.
[15] Ibid, p 42 to 43
[16] Ibid, p 44, para 23.
[17] Ibid, p 45, para 25.
[18] Pleadings, p 23, paras 23 and 24.
[19] Ibid, p 22, paras 21 and 22.

[20] 2009 (1) BCLR 1 (CC).

them, in a manner that they deem fit. However, they need to resolve the real dispute and deal with the substance thereof between the parties.[21]

[19] The same Court, in *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others 2016 (4) BCLR 443 (CC)*, emphased the need for arbitrators to clarify as to which charges an employee is guilty or not guilty of if he was dismissed for more than one offence. It concluded that,

> *"[19] The applicant complains that the arbitrator found him guilty of misconduct of which he had wrongly been charged. He was charged with initiating the process for the repair of the incinerators and his defence was that he did so to comply with a lawful instruction from Dr Wasilota.* ***It is indeed not clear from the arbitrator's award which charges he found to have been proved and which not. One would have expected the arbitrator to make this clear, as this would have facilitated an understanding of his reasons for the award***." [22]

[20] The LAC, reaffirming what it said in *County Fair Foods (Pty) Ltd v CCMA [1999] 11 BLLR 1117 (LAC)*, in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA73/15)*[23] held thus ,

> *"The fact that the Commissioner glossed over and did not determine the primary question whether Ramapuputla was dishonest, as correctly found by the Court a quo, is problematic. That determination was central to the question whether the reason given for Ramapuputla's dismissal was fair. In County Fair Foods (Pty) Ltd v CCMA, this Court sounded a warning that failure to deal with an important facet may,*

[21] Ibid, at para 65.

[22] At para 25. Own emphasis.
[23] Handed down on 10 January 2017.

depending on the circumstances of the case, provide evidence that the Commissioner did not apply his/her mind to that facet."[24]

[21] What is apparent in the arbitration records,[25] is that the arbitrator gave the parties a full opportunity to present their respective cases, and he identified the issues in dispute. However, the remaining threefold question is: did he understand what he was required to decide? Did he deal with the substantial merits of the dispute? Moreover, based on that, is his decision one that a reasonable decision-maker could have made?[26]

[22] Despite mentioning the evidence, the arbitrator does not state whether he accepts the evidence of the employee, in respect of the count 3 of first charge, or not. Nor is there an analysis of the components of this charge, as he did with charges 2, 3, and 4. The only part of first charge which he deals with is the insubordination relating to failure to clean the bakkie. Therefore, as he has failed to deal with the other aspect of the first charge, despite identifying the evidence, in the circumstances, he did not understand what was required of him, taking into account that there were presumably conflicting comprehension of what was understood to be the instruction on the morning of 20 February 2017.

[23] I, therefore, conclude that the arbitrator committed reviewable irregularity as he failed to apply his mind to what he was required to do. If he understood his task, he would have given reasons for the conclusions as he did with other charges and that would have facilitated his understanding of the conclusion that the dismissal was substantively unfair and why the applicant should pay the employee an amount of R143 130,00 as a compensation. This makes his

[24] At para 23.
[25] Which were not complete, and the parties had to reconstruct them. Respective Counsel for the Applicant and First Respondent confirmed on 04 September 2020 that the records are now complete.

[26] Goldfields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v CCMA and Others [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC), at para 20.

findings of substative unfairness, of the dismissal ,to be reviewable as is the one that a reasonable decision-make could not have made ***"consider[ing] all relevant circumstances."*** This conclusion is , further, supported by what I set out below.

[24] Relating to count 3 of first charge, as summarised above, the evidence presented before the arbitrator requires scrutiny in that during cross-examination, the employee did not deny that Mr Vogel said that he was not told to go home but was asked to wait for necessary documents to be issued.

[25] Furthermore, in the circumstances, the probabilities favour the Applicant's version that the employee was not told to go home, but was advised to wait for "the Director outside the office, in order to be given necessary documents."[27] This is supported by the SMSes that were sent to the employee, as captured in paragraphs 8 and 9 above. I, therefore, find that the employee is guilty of count 3 of first charge.

[26] I understand that the employee worked for the employer for more than 12 years and this may be a mitigating factor. However, each case has to be decided based on its own merits.[28] The aggravating circumstances in this matter outweigh the mitigation factors. In that, at the time of the offences, the employee had a final written warning relating to insubordination; dangerous and negligent driving.[29]

[27] The arbitrator confirmed that the employee was guilty of disregarding the rules of the road on numerous occasions. Moreover, it has to be taken into account further that in all these instances, the employee was using the Applicant's

[27] Pleadings, p 21, para 9.
[28] Toyota South Africa Motors (Pty) Ltd v Radebe and Others (DA2/99) [1999] ZALAC 42 (3 December 1999), at paras 15 and 16.

[29] Vol 1, p 56 and part of p 350.

motor vehicle, at some stage, he was found driving at 160km per hour at 120 km zone. The arbitrator captured the evidence of Mr Vogel, in this regard thus, when he enquired from the employee as to why he was driving at an excessive speed he said: *"driving fast keeps him alert and awake"*. Nevertheless, the applicant does not see anything wrong about his conduct, as, during his testimony, he kept on saying he is the one who is paying for speed fines.[30]And it was not disputed during the arbitration that the Applicant received more than three complaints from fellow motorists about the employee's bad driving.

[28] In total, the Applicant is guilty of the third, fourth charges, and count 3 of first charge. Considering *inter alia* that he had a final written warning, and the guilty verdict on the latter charge, I conclude that another final written warning would not be fair on the Applicant; therefore, the dismissal was an appropriate sanction.

[29] In the circumstances, I conclude that the following order is appropriate.

Order

[30] Wherefore, the following order is made:

1. The arbitration award issued by the Second Respondent under the third respondent's case number GAJB5088-17 is reviewed and set aside and replaced with an order that

   "The dismissal of Michele Radiccia by AWA Water Management (Pty) Ltd was both procedurally and substantively fair."

2. No order as to costs.

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S Mabaso

[30] Vol 1, p 85.

Acting Judge of the Labour Court of South Africa

For the Applicant: Ms Lancaster

Instructed by: Lancaster Kungoane Attorneys

For the First Respondent: Mr Goldberg

Instructed by : Goldberg Attorneys

Appearances

For the Applicant:

Instructed by:

For the Respondent:

Instructed by: