THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1731/19

In the matter between:

CABLE TAPES AFRICA **Applicant**

and

COMMISSIONER MATOME VICTOR SEHUNANE **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

SIFISO EMMANUEL BIYASE **Third Respondent**

Decided: **In Chambers**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 12 May 2020.**

Review application – employee charged and dismissed for gross negligence – the commissioner failed to apply his mind to the evidence before him – the arbitration award falls short of the threshold of reasonableness.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an unopposed review application in terms of Section 145 of the Labour Relations Act[1] (LRA). The applicant Cable Tapes Africa (CTA) seeks an order reviewing and setting aside the arbitration award issued by the first respondent (commissioner) under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) under case number GAJB28748-18 dated 28 July 2019. The commissioner found that the dismissal of the third respondent, Mr Sifiso Emmanuel Biyase (Mr Biyase), was substantively and procedurally unfair. He accordingly ordered CTA to pay compensation of R121 240.00, which is equivalent to 10 months' remuneration.

[2] CTA's main impugn is that the commissioner issued an unreasonable award.

Background

[3] Mr Biyase had been in the employ of CTA since 1 February 2012, holding a position of a Lamination Machine Operator. CTA runs a business of supplying tapes, films, water blocking and armouring materials used in the Cable Industry. The applicant has huge machines which run for 24 hours.

[4] On 1 November 2018, Mr Biyase was on nightshift duty operating a laminating machine. The pump in the machine started making a funny noise. Upon inspection, he realised that it was malfunctioning. He immediately reported the problem to the Operations Manager, Mr Shanon Sevnarayn (Mr Sevnarayn), who was the only witness for CTA. According to Mr Sevnarayn, Mr Biyase informed him that the extent of the defect on the tape was minimal hence he advised him to continue to run the machine.

[5] The next day, 2 November 2018, the dayshift personnel discovered that the whole tape that Mr Biyase was working on was defective and had to be scrapped. As a result, the applicant suffered financial loss in the amount of R35 000.00. According to Mr Sevnarayn, Mr Biyase could not provide any reason why he had failed to stop the machine when he realized that the defect on the tape was extensive.

[1] Act 66 of 1995 as amended.

[6] On the other hand, Mr Biyase was adamant that he was not responsible for the incident and the losses suffered by CTA. According to him, the problem was caused by the faulty pump which was not serviced and calibrated. He did report the incident to the dayshift personnel and supervisor. The dayshift personnel took the pump to the workshop and it was replaced. When he reported for night duty on 2 November 2018, the machine was working perfectly.

[7] Also, Mr Biyase testified that the machine that he was running could not be stopped in order to salvage the tape. Instead what he did, given the circumstances, was to rerun the pump.

[8] Mr Biyase was charged with two counts of gross negligence. A disciplinary inquiry was held on 9 November 2018. He was found guilty as charged and dismissed on 4 December 2018. Following his dismissal, Mr Biyase referred an unfair dismissal dispute to the CCMA. Consequent to unsuccessful conciliation, the matter was arbitrated hence the impugned arbitration award.

Legal principles and application

[9] At issue is whether the impugned arbitration award is in line with the reasonableness test laid down by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[2]

[10] Mr Biyase was charged with two counts of gross negligence. Firstly, in that, on 1 November 2018, he produced defected material in relation to DAPL200 Adhesive miss on Jumbo Roll 52873 which resulted in financial loss to CTA. Secondly, in that, he produced defect material resulting in financial loss to CTA.

[11] On the first count, it is common cause that Mr Biyase did report the problem with the machine to Mr Sevnarayn. Even though it is disputed whether or not he specifically mentioned that the pump was malfunctioning, Mr Biyase did

[2] [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC); See also *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

report the problem with the pump at the end of his shift and it was accordingly replaced. Mr Sevnarayn's main qualm in this regard is that had Mr Biyase stopped the machine, the damage could have been mitigated. In fact, it was his evidence that he gave Mr Biyase two suggestions on how to deal with the problem; firstly, to stop the poly, pull it back and recoat, and, secondly, to take out the roll and stop the entire poly from what he had already laminated. Notwithstanding, Mr Biyase failed to give regard to his suggestions.

[12] Mr Biyase's response was that instead of being charged with gross negligence, he should have been charged with insubordination for failing to follow Mr Sevnarayn's suggestions. There is no merit on this assertion. CTA relied on Mr Biyase's skills and experience in operating the laminating machine. In the end, he had to use his discretion while exercising due diligence. It is clear that he never tried to stop the machine or implement the suggestions he had been given by Mr Sevnarayn. Mr Sevnarayn testified that it would have taken two seconds to stop the machine and mitigate the damage. Even if the damage had already occurred when the pump stopped, clearly stopping the machine could have salvaged some of the product.

[13] The commissioner placed undue emphasis on the faulty pump. The negligence in this instance emanated from Mr Biyase's failure to apply measures that could have lessened the extent of the damage.

[14] Moving on to the second count of gross negligence. Mr Biyase's main defence was that he had been instructed to use a damaged roller because the order was urgent. However, during cross-examination he was confronted with a version he had mooted during the disciplinary hearing which is totally different. In those proceedings his version of defence was that the problem was with the coating and not the damaged roller. A comparison was then made between Mr Biyase and a junior Machine Operator who managed to find the problem and dealt with it. To that, his answer was that 'I find it strange'.[3]

[3] See: CCMA Record, p 22.

[15] Mr Biyase was not a stranger to ill-discipline. At the time of his dismissal, he was on a final written warning for a similar offence which was due to expire on 1 January 2019. This evidence eloped the commissioner's attention.

[16] The above annotations warrant that I brood over what constitutes the misconduct of gross negligence. Tritely, in labour law, as suggested by Grogan, 'negligence bears the same meaning as it does in other areas of the law namely the culpable failure to exercise the degree of care expected of a reasonable person. In the workplace context, the 'reasonable person' would be the reasonable employee with experience, skill and qualifications comparable to the accused employee. The learned author continues and says: 'Negligence may manifest itself in acts or omissions. The test is whether a reasonable employee in the position of the accused employee would have foreseen the possibility of harm and taken steps to avoid that harm. Employees may be guilty of negligence even if no harm results from their acts or omissions; what matters is if they might have caused harm. Negligence is akin to carelessness; if the employee actually foresaw the harm, the misconduct would be classified as deliberate, not negligent, and would self-evidently be more serious. Negligence and poor work performance overlap to the extent that work negligently performed is poor. However, poor work performance connotes consistent slipshod work. A single negligent act seldom warrants dismissal at first instance, unless it is of a kind so gross as to amount to recklessness.'[4]

[17] In the matter at hand, it is my view that Mr Biyase was grossly negligent as in both instances CTA suffered huge financial losses. In addition, it is clear that the progressive disciplinary measures did not yield any fruit. Hence, dismissal was an appropriate sanction.

[18] On procedural fairness, the commissioner made inconsistent findings in that he approved the procedure that led to the dismissal of Mr Biyase, while on the other hand, found that the dismissal was procedurally unfair. There is merit in CTA's submission that had the commissioner applied his mind to the evidence and the findings that he made in his arbitration award, he would not have

[4] Grogan John: Workplace Law 10th Ed 20090, ch 13-p 226

made an order to the effect that Mr Biyase's dismissal was procedurally unfair, a finding which is unreasonable.

Conclusion

[19] It follows that the impugned arbitration award to the effect that Mr Biyase's dismissal was procedurally and substantively unfair is not one which a reasonable decision maker would have arrived at. As such, it stands to be reviewed and set aside.

[20] I deem it expedient not to remit this matter back to the CCMA in the interest of justice. The issues were properly ventilated during the arbitration proceedings and the record of those proceedings is patently adequate. I am, accordingly, in a position to determine the matter to its finality.

[21] In the light of the findings which I have arrived at above, it is clear that the dismissal of Mr Biyase was procedurally and substantively fair.

[20] Therefore, I make the following order:

Order.

1. The arbitration award issued by the first respondent under the auspices of the second respondent, under case number GAJB28748-18, dated 28 July 2019 is reviewed and set aside and substituted with the following order:

   1.1 The dismissal of Mr Biyase is procedurally and substantively fair.

2. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa