

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN BRAAMFONTEIN**

CASE NO: JR1577/08

BRIDGEPORT COMPANY

Applicant

And

THANDIWE TSHAYANA N.O.

1st Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

2nd Respondent

MFUNDISI DOCTOR NKUNA

3rd Respondent

JUDGMENT

GCABASHE AJ

Introduction

1. This is an application for the review of an arbitration award consequent on the dismissal of the Third Respondent by the Applicant on the grounds that by removing or attempting to remove company property without the necessary authorisation, he had failed to follow company policy and procedure. The Commissioner, having heard the evidence of the Third Respondent as well as that of the Applicant's witnesses, concluded that

the dismissal of the Third Respondent was substantively unfair. She proceeded to award him compensation of R55 000 which was the equivalent of 10 month's salary.

2. The Applicant at the outset sought leave to abandon prayer 2 of the Notice of Motion, which leave was granted.

Grounds of Review

3. The gravamen of the Applicant's complaint in these review proceedings is that the Commissioner failed to apply her mind to the material evidence of the Applicant's witnesses, which evidence, it was argued, clearly indicated the Third Respondent's guilt on the charge of attempting and or succeeding to remove company property without being authorised to do so. Applicant argued that the onus on an employer is to make out a case on a balance of probabilities. In this instance, Applicant submitted, given the evidence of the three witnesses called by it, this standard of proof had been met.
4. The second primary ground of review revolves around the 10 month's salary awarded to the Third Respondent as compensation, who when asked by the Commissioner what quantum of compensation he thought was just and equitable, stated that five months salary was appropriate. The Applicant challenges this award as being beyond the powers of the Commissioner.

The evidence

5. The context of the charge against the Third Respondent was that he was employed by the Applicant as a warehouse supervisor. The Applicant is in the logistics business of storing and transporting commodities such as copper and nickel for customers. Since the beginning of 2007 it experienced increased incidents of theft of these two products in particular.
6. In an effort to stem this, the Applicant employed a firm of private investigators who placed undercover agents at the spots where the most aggravated incidents of theft were occurring. This included the warehouse where the Third Respondent was in charge and in control of the movement of stock during the period March to end of June 2007. The two undercover agents and one other employee gave evidence of the goings on at the warehouse. Their testimony unequivocally indicted the Third Respondent, argued the Applicant, certainly for the period March to end June 2007, making the conclusions and award of the Commissioner irrational and unrelated to the evidentiary material properly before her.
7. Underpinning the conclusions of the Commissioner were her findings on the relevance and reliability of the testimony of the three witnesses for the Applicant. She compared their testimony at the disciplinary hearing to that given at the arbitration proceedings, finding that material aspects

of the latter testimony was inconsistent with the former, and was unreliable, unclear, and incoherent.

8. With regard to the Third Respondent's testimony she found material aspects of it to be uncontested and truthful, and concluded that the Applicant was on a witch hunt in an effort to get rid of the Third Respondent. No systematic reasons for this conclusion were set out, save the criticism levelled at the Applicant for not calling a particular witness, and her acceptance of the Third Respondent's explanation of how one truck came to be short of a load.

Analysis

9. I have taken note of the evidence that was properly before the Commissioner and find no manifest support for the conclusions that she has drawn. Part of the difficulty, I surmise, is that she has failed to appreciate the elements of the charge that the Third Respondent was found guilty of, as opposed to the charge of theft which was originally preferred against him but abandoned at the disciplinary hearing for lack of evidence. Thus the evidence that was led, though it in parts referred to the theft of product, was proffered in substantiation of the charge of attempting and or successfully removing, without authority, certain items of the Applicant. These items were clearly identified in the evidence as constituting copper wire.
10. The witnesses gave testimony on the authority and control that the Third

Respondent had in the warehouse section of the Applicant's business.

What contradictions that might have emerged regarding dates, were not material. The facts placed before the Commissioner indicated that the Third Respondent was in charge of a network of individuals who were misappropriating or attempting to misappropriate copper wire that was in the possession of or under the control of the Applicant. The Third Respondent contested this testimony. This is the only basis I have found for the conclusion drawn by the Commissioner that he had an "*uncontested version*", a conclusion that is completely out of kilter with the evidence on record.

11. The Court in *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others*¹ set out clear guidelines regarding the factors that a Commissioner must take into account. These are consistent with the dicta of the Constitutional Court in the **Pharmaceutical Manufacturers**² matter and a host of related authorities on rational decision making. The determination of reasonableness, these cases have held is objective.
12. In taking account of the totality of the evidence before her, a Commissioner presiding at arbitration proceedings is enjoined to consider the material that is properly before her, such as the basis of the employers' conclusions. This Commissioner failed to do this. A Commissioner is required to consider the harm caused by the conduct of the employee. This Commissioner failed to apply her mind to this aspect.

¹ 2008 (2) SA 208 (CC) at para [78]

² Pharmaceutical Manufacturers Association of South Africa: In Re. Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at para [89] – [90]

13. A Commissioner is expected to use his or her own sense of justice or fairness. This Commissioner failed to apply her mind to the probity of the evidence presented by the Applicant. Her conclusions cannot be said to be reasonable, nor can it be said that a different Commissioner could not come to a different decision.
14. I am mindful of the obligations that rest with a reviewing court, to avoid second guessing a decision maker who has had the opportunity to hear evidence first hand, get a sense of the credibility of witnesses, and generally, appreciate the relevance of all the evidence that was presented. Despite this, I am constrained to find that the conclusions of this Commissioner were not arrived at with a full appreciation of all the material that was placed before her on the facts and circumstances that led to the dismissal of the Third Respondent.
15. I draw the same conclusion with regard to the appropriateness of the compensation awarded. No justification is set out for the amount awarded. No justification for an award of 10 months, as opposed to an award of 5 month's salary, for instance, is proffered. I have concluded that the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings. The conclusions of the Commissioner are not defensible when measured against the totality of the evidence.
16. In the premises I make an order setting aside the award of the Commissioner and remitting the matter back to the Second Respondent

for the appointment of another Commissioner to hear the matter *de*⁷
novo.

17. There is no order as to costs.

GCABASHE AJ